No. 89-1363-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Darlina K. France

Docketed:
February 26, 1990

Court: United States Court of Appeals
for the Ninth Circuit

See also:
89-1084
89-6313

Counsel for petitioner: Solicitor General

Counsel for respondent: Levine,Michael R.

Entry	Date	Note	Proceedings and Orders
1	Feb 26 1990	G	Petition for writ of certiorari filed.
3	Mar 14 1990		Order extending time to file response to petition until April 28, 1990.
5	Apr 2 1990		Brief of respondent Darlina K. France in opposition filed.
6	Apr 2 1990	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Apr 4 1990		DISTRIBUTED. April 20, 1990
7	Apr 17 1990	X	Reply brief of petitioner United States filed.
8	Apr 23 1990		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Apr 23 1990		Petition GRANTED.
			**********
10	May 7 1990	G	Motion of respondent for appointment of counsel filed.
11	May 21 1990		Motion for appointment of counsel GRANTED and it is ordered that Michael R. Levine, Esquire, of Honolulu, Hawaii, is appointed to serve as counsel for the respondent in this case.
12	Jun 5 1990		Joint appendix filed.
13	Jun 7 1990		Brief of petitioner United States filed.
15	Jun 18 1990		Order extending time to file brief of respondent on the merits until July 27, 1990.
16	Jul 23 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 2, 1990. (2ND CASE)
17	Jul 27 1990		Brief of respondent Darlina K. France filed.
18	Aug 10 1990		CIRCULATED.
19	Aug 29 1990	X	Reply brief of petitioner United States filed.
21	Sep 14 1990		Record filed.
		*	Certified copy of original record and C. A. proceedings received. (Box).
20	Sep 17 1990	X	Supplemental brief of respondent Darlina K. France filed.
22	Oct 2 1990		ARGUED.

89- 1363

No.

FILED
FEB 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

BRIAN J. MARTIN
Assistant to the Solicitor General

J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

39 pp

QUESTION PRESENTED

Whether this Court's decision in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), requires reversal of respondent's convictions even though she did not object to a magistrate's conducting voir dire and even though her attorney expressed no objection to the manner in which the jury was selected.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Rules involved	2
Reasons for granting the petition	5
Statement	2
Conclusion	18
Appendix A	1a
Appendix B	13a
Appendix C	15a

TABLE OF AUTHORITIES

Cases:

Engle v. *Issaac*, 465 U.S. 107 (1982)	11
Estelle v. *Williams*, 435 U.S. 501 (1976)	9
Gomez v. *United States*, 109 S. Ct. 2237 (1989)	4, 5, 6, 14
Government of the Virgin Islands v. *Williams*, 892 F.2d 305 (3d Cir. 1989)	17
Griffin v. *Kentucky*, 479 U.S. 314 (1987)	4
Guam v. *Yang*, 850 F.2d 507 (9th Cir. 1988)	5, 11-12
Levine v. *United States*, 362 U.S. 610 (1960)	9, 14
Luce v. *United States*, 469 U.S. 38 (1984)	10
Martone v. *United States*, 435 F.2d 609 (1st Cir. 1970)	11
Segurola v. *United States*, 275 U.S. 106 (1927)	9
United States v. *Bamberger*, 456 F.2d 1119 (3d Cir. 1972), cert. denied, 413 U.S. 919 (1973)	10
United States v. *Bascaro*, 742 F.2d 1335 (11th Cir. 1984), cert. denied, 472 U.S. 1017 (1985)	14
United States v. *Bayko*, 774 F.2d 516 (1st Cir. 1985)	14
United States v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986)	5, 12

Cases – Continued: Page

United States v. *Blackwell*, 694 F.2d 1325 (D.C. Cir. 1982) 15
United States v. *Brown*, 493 F.2d 485 (5th Cir.), cert. denied, 419 U.S. 865 (1974) 13
United States v. *Coleman*, 707 F.2d 374 (9th Cir.), cert. denied, 464 U.S. 854 (1983) 14
United States v. *Coppola*, No. 89-10214 (9th Cir. Oct. 18, 1989) 7
United States v. *DeFiore*, 720 F.2d 757 (2d Cir. 1983), cert. denied, 466 U.S. 906 (1984) 15-16
United States v. *Figueroa*, 818 F.2d 1020 (1st Cir. 1987) 14
United States v. *Frady*, 456 U.S. 152 (1982) 8, 14
United States v. *Gagnon*, 470 U.S. 522 (1985) 9, 10
United States v. *Holland*, No. 88-1253 (9th Cir. Jan. 2, 1990) 7
United States v. *Kaili*, No. 89-10113 (9th Cir. Sept. 13, 1989) 7
United States v. *Kaleiwahea*, No. 89-10225 (9th Cir. Sept. 29, 1989) 7
United States v. *Kirkland*, 637 F.2d 654 (9th Cir. 1980) 13
United States v. *Kuamsiri*, No. 88-1432 (9th Cir. Sept. 13, 1989) 7
United States v. *Liquori*, 438 F.2d 663 (2d Cir. 1971) 11
United States v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989), reh'g granted (Feb. 9, 1990) 12, 16
United States v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), cert. denied, No. 89-5949 (Feb. 20, 1990) 16
United States v. *Nguyen*, No. 89-10235 (9th Cir. Oct. 18, 1989) 7
United States v. *Nittayanupap*, 884 F.2d 1318 (9th Cir. 1988) 7

Cases – Continued: Page

United States v. *Peacock*, 761 F.2d 1313 (9th Cir.), cert. denied, 474 U.S. 847 (1985) 5, 12
United States v. *Reb'll*, 887 F.2d 1009 (9th Cir. 1989) 7
United States v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983) 16
United States v. *Silverstein*, 732 F.2d 1338 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985) ... 15
United States v. *Smith*, 490 F.2d 789 (D.C. Cir. 1974) 10
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 8
United States v. *Surridge*, 687 F.2d 250 (8th Cir.), cert. denied, 459 U.S. 1044 (1982) 14
United States v. *Taylor*, No. 88-1441 (9th Cir. Sept. 29, 1989) 7
United States v. *Thame*, 846 F.2d 200 (3d Cir.), cert. denied, 109 S. Ct. 314 (1988) 15
United States v. *Thate*, No. 89-10360 (9th Cir. Oct. 18, 1989) 7
United States v. *Vanwort*, 887 F.2d 375 (1989), petitions for cert. pending, Nos. 89-1084, 89-6313 16
United States v. *Wey*, No. 89-2106 (7th Cir. Feb. 15, 1990) 15, 16
United States v. *Woodner*, 317 F.2d 649 (2d Cir.), cert. denied, 375 U.S. 903 (1963) 13
United States v. *Young*, 470 U.S. 1 (1985) 14
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 10
Yakus v. *United States*, 321 U.S. 414 (1944) 8

Constitution, statutes and rules:

U.S. Const.:
Amend. IV 9, 14
Amend. V 14

Statutes and rules – Continued:	Page
Federal Magistrates Act:	
28 U.S.C. 631 *et seq.*	6
28 U.S.C. 631-639	4
28 U.S.C. 636	7
28 U.S.C. 636(b)(3)	6
18 U.S.C. 113(c)	2
18 U.S.C. 113(f)	2
18 U.S.C. 924(c)	2, 4
Fed. R. Crim. P.:	
Rule 24	15
Rule 43	9
Rule 43(a)	9
Rule 51	2, 8, 9, 10, 11, 12
Rule 52(b)	2, 10, 13, 14, 15
Miscellaneous:	
3 W. LaFave, *Criminal Procedure* (1984)	9-10
Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 De Paul L. Rev. 753 (1980)	9
3A C. Wright, *Federal Practice and Procedure* (2d ed. 1982)	9

In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 886 F.2d 223.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1989, and a petition for rehearing was denied on January 16, 1990. App., *infra*, 15a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Federal Rule of Criminal Procedure 51 provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

Federal Rule of Criminal Procedure 52(b) provides:

> *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

After a jury trial in the United States District Court for the District of Hawaii, respondent was convicted of assault with a deadly weapon, in violation of 18 U.S.C. 113(c), assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(f), and use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c). She was sentenced to five years' imprisonment and three years' probation.

1. On December 20, 1986, respondent became upset with her third husband, Neil, when he knocked over a Christmas tree during an argument in their house on a military reservation in Hawaii. Tr. 29, 44, 164-165. Neil left the house and went to a nearby PX. Tr. 48. Later that day, she told a friend that she was angry at her husband and that she would shoot him if she could find a gun. Tr. 165. She

had made similar remarks in the past. Tr. 221. Respondent was drinking beer at home with her friends when Neil returned. Neil was disturbed that respondent was drinking, so he took her beer from the refrigerator and moved it out into the yard. Respondent then chased Neil into the kitchen where they had a loud argument. Tr. 165-168.

After the fight, Neil left the house. Respondent, carrying a gun, then emerged from the house and told Neil that he should leave. Tr. 169-170, 316. Neil, however, started to walk back toward the house. Respondent then shot and seriously wounded Neil. Tr. 196. She walked over to him and said in a normal tone of voice, "I told you I would do it." Tr. 211. When a military policeman arrived on the scene, respondent told him: "He threw the Christmas tree down and that made me mad, but he took my beer and that was the last straw." Tr. 352-353. Respondent admitted at trial that she had also fired a gun at her first husband, and that she had boasted of shooting at her second husband. Tr. 311, 328.

2. Prior to trial, in accordance with what was at that time the regular practice in the District of Hawaii, the district court assigned jury selection to a federal magistrate. Respondent did not object to this assignment, nor did she request that a district judge conduct the voir dire.

During voir dire, the magistrate sustained respondent's only objection to a proposed question submitted by the government. 4/27/87 Tr. 62-63. In addition, the magistrate asked an additional question of the venire at respondent's request. 4/27/87 Tr. 65. At the conclusion of jury selection, the magistrate asked the parties: "For the record, would you like—is there any objection you'd like to make in the manner in which the jury was selected?" 4/27/87 Tr. 71. Respondent's counsel replied: "No, your honor." *Ibid.* When the trial began the next day before a

district judge, respondent did not object to the magistrate's supervision of jury selection or to any of the magistrate's rulings. The jury found petitioner guilty on all three counts described above.[1]

3. In her initial brief on appeal, respondent challenged only her firearms conviction under 18 U.S.C. 924(c). She did not raise any issue concerning the selection of the jury by the magistrate. While the appeal was pending, this Court decided *Gomez* v. *United States*, 109 S. Ct. 2237 (1989). In *Gomez*, the Court held that the Federal Magistrates Act, 28 U.S.C. 631-639, does not authorize district courts to delegate jury selection in felony trials to magistrates, and that the selection of a jury by a magistrate is not harmless error if the defendant made a timely objection. In a motion filed in the court of appeals after the *Gomez* decision, respondent argued for the first time that the district court committed reversible error in delegating jury selection to a magistrate.

The court of appeals reversed respondent's convictions. The court first held (App., *infra*, 7a-8a) that *Gomez* should be applied retroactively to all cases pending on direct appeal at the time it was decided.[2] The court then held that respondent had not waived her right to raise the *Gomez* claim by her failure to object in the district court. The court reasoned that nothing in the *Gomez* opinion suggests that "the Court intended to limit the broad, definitive rule it announced" to cases, like *Gomez*, in which the defendant objected. *Id.* at 9a.

The court of appeals held that, in any event, no objection was necessary to preserve the claimed error because

[1] Count One of the indictment charged respondent with assault with the intent to commit murder. The jury found her guilty of the lesser-included offense of assault with a deadly weapon.

[2] The government does not challenge the court of appeals' ruling on that point. See generally *Griffith* v. *Kentucky*, 479 U.S. 314 (1987).

two prior decisions of the Ninth Circuit had authorized magistrates to conduct voir dire in felony trials.[3] App., *infra*, 9a-10a. Thus, according to the court, respondent faced a "solid wall of circuit authority" that "would have prevented the district court from correcting the alleged error." *Id.* at 10a. In the court's view, to require a defendant to object to "aspects of the trial that have already been approved by the court of appeals" would encourage "defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned." *Ibid.* (quoting *Guam* v. *Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc)).

The Ninth Circuit noted that the "solid wall of circuit authority" exception to the contemporaneous-objection rule had been used only to excuse a defendant's failure to object to a jury instruction. It reasoned, however, that the rule announced in *Gomez* "touches on one of the most 'basic rights' of the accused, the right to a fair and accurate trial." App., *infra*, 10a. Thus, the court concluded that it would be "at best unseemly, and at worst irresponsible, to penalize" respondent for failing to object. *Ibid.*[4]

REASONS FOR GRANTING THE PETITION

In *Gomez* v. *United States*, the defendants objected to the delegation of jury selection to a federal magistrate. The district court overruled that objection, and the Second Circuit affirmed. This Court granted certiorari to decide whether the assignment of jury selection to a magistrate

[3] The two decisions were *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), cert. denied, 474 U.S. 847 (1985), and *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986).

[4] The court of appeals denied the government's petition for rehearing with suggestion for rehearing en banc. App., *infra*, 15a.

"without the defendant's consent" violated the Federal Magistrates Act, 28 U.S.C. 631 *et seq.* See 109 S. Ct. at 2239. The Court held that presiding over jury selection at felony trials is not one of the "additional duties" that may be delegated to magistrates under 28 U.S.C. 636(b)(3). And the Court ruled that such a delegation, over "the defendant's objection," cannot be harmless error. 109 S. Ct. at 2248.

Since *Gomez*, the courts of appeals have struggled with the resolution of direct appeals where the defendant did not object to the magistrate's presiding at voir dire.[5] The questions arising from *Gomez* are especially important to the administration of the federal criminal justice system because, prior to *Gomez*, many district courts frequently delegated jury selection to magistrates. In addition, the circuits have adopted several different approaches to post-*Gomez* appeals. The Second and Seventh Circuits have held that an objection is required to preserve the *Gomez* error for review. The Third Circuit has ruled that no objection is needed to preserve the issue, but that there is no error of law in the delegation of jury selection to a magistrate if the defendant consents. And the Ninth Circuit, in this case, has held that defendants raising a *Gomez* claim are not bound by the general principle that legal issues are forfeited on appeal if not first raised in the district court. We believe that this case is a good vehicle for resolving the important issue whether a defendant's conviction must be reversed under *Gomez* even though he did not object to the magistrate's presiding at voir dire.

---

[5] The courts have agreed that the *Gomez* decision applies to all cases that were on direct appeal at the time. App., *infra*, 7a-8a. The government does not dispute that conclusion. See note 2, *supra*. Because this case is on direct review, it does not present the question whether *Gomez* applies as well to collateral attacks on convictions.

1. The issue presented is important to the federal criminal justice system. Prior to *Gomez*, 51 district courts had local rules that provided magistrates with the unqualified authority to conduct voir dire in civil and criminal cases. See U.S. Br. at 22-23 & n.17 in *Gomez*, Nos. 88-5014, 88-5158. Eighteen other districts had rules that allowed magistrates to perform all duties conferred on them by 28 U.S.C. 636, which was often construed to include conducting voir dire. *Gomez* U.S. Br. at 23 & n.19. Undoubtedly, there are many defendants from all over the country who did not object to a magistrate's conducting voir dire and are thus in the same position as respondent.

The Ninth Circuit's decision in this case has particular significance because certain district judges in that circuit routinely referred jury selection to a magistrate. On the basis of its decision in this case, the Ninth Circuit has already reversed the convictions of 15 other defendants. See *United States* v. *Thate*, No. 89-10360 (Oct. 18, 1989); *United States* v. *Nguyen*, No. 89-10235 (Oct. 18, 1989); *United States* v. *Kaleiwahea*, No. 89-10225 (Sept. 29, 1989) (two defendants); *United States* v. *Coppola*, No. 89-10214 (Oct. 18, 1989); *United States* v. *Kaili*, No. 89-10113 (Sept. 13, 1989); *United States* v. *Kuamsiri*, No. 88-1432 (Sept. 13, 1989) (two defendants); *United States* v. *Taylor*, No. 88-1442 (Sept. 29, 1989); *United States* v. *Holland*, No. 88-1253 (Jan. 2, 1990) (three defendants); *United States* v. *Reb'll*, 887 F.2d 1009 (1989); *United States* v. *Nittayanupap*, No. 87-1395 884 F.2d 1318 (1988) (two defendants). The United States Attorney for the District of Hawaii filed in the court of appeals a declaration noting that the District of Hawaii had delegated jury selection to magistrates in "virtually all" criminal cases since the mid-1980s. App., *infra*, 13a. He stated that, if

the Ninth Circuit's decision in this case is not overturned, the convictions of 48 defendants in the District of Hawaii alone "will be reversed and remanded for retrial." *Ibid.*[6] Thus, we believe that the issue presented in this case, which would affect a large number of criminal convictions in the Ninth Circuit and elsewhere, is sufficiently important to warrant plenary review by this Court.

2. a. The court of appeals erred in not holding that respondent forfeited her right to have a district judge preside over the jury selection at her trial. This Court has emphasized that "[n]o procedural principle is more familiar to [the] Court than that a * * * right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). Accord *United States* v. *Frady*, 456 U.S. 152, 162 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). This rule regarding the forfeiture of legal claims is embodied in Federal Rule of Criminal Procedure 51. That rule abolished the historic use of "exceptions" to preserve legal claims regarding a trial court's orders or actions. But Rule 51 insists that a party make its objections and desires known to the district court. An error is preserved under the rule only if the party "makes known to the court the action which that party desires the court to take or that party's objection to the action of the court."[7]

---

[6] We are informed by the Criminal Division of the Department of Justice that judges from several other jurisdictions often delegated voir dire to a magistrate—the District of Puerto Rico, the Eastern District of New York, the Central District of Illinois, the Central District of California, the Eastern District of Michigan, the District of the Virgin Islands, and the District of Delaware.

[7] Rule 51 excuses the lack of an objection if "a party has no opportunity to object to a ruling or order."

This Court, of course, has applied the "raise it or forfeit it" rule in many contexts.[8] For example, in *United States* v. *Gagnon*, 470 U.S. 522 (1985), the district court held a conference in chambers without the presence of the defendants. The defendants did not object, but on appeal argued that the district court had violated their right under Federal Rule of Criminal Procedure 43(a) to be present at all stages of a criminal trial. This Court held that the defendants had forfeited their rights under Rule 43 by failing to object at trial. 470 U.S. at 527-528. Likewise, in *Levine* v. *United States*, 362 U.S. 610 (1960), the Court ruled that the defendant had forfeited any due process right to a public trial by not asking the district judge to open the courtroom. *Id.* at 619. See also *Segurola* v. *United States*, 275 U.S. 106, 111-112 (1927) (Fourth Amendment challenge to the seizure of evidence forfeited in the absence of a timely motion to suppress); 3A C. Wright, *Federal Practice and Procedure* § 842, at 287 (2d ed. 1982) (requirement that defendant object and express his preference applies "to all kinds of rulings at the trial").

The reasons that the defendant must make his views known to the trial court are clear. First, the defendant should not be able to pursue a certain course for tactical reasons and, if convicted, later claim that the course taken by the court was reversible error. See 3 W. LaFave, *Crimi-*

---

[8] Strictly speaking, Rule 51 sets forth a rule of forfeiture, not waiver, although the courts often speak in terms of a defendant's "waiver" of a legal claim. See Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 De Paul L. Rev. 753, 757-758 (1980). The term "waiver" often connotes the intelligent and knowing relinquishment of a right. The forfeiture principle in Rule 51, by contrast, does not depend on the defendant's state of mind when he failed to raise an issue in the trial court. See *Estelle* v. *Williams*, 425 U.S. 501, 508 & n.3 (1976).

nal Procedure § 26.5, at 251 (1984); see also *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977). Second, and perhaps more important, the requirement that the defendant make his views known to the trial court greatly promotes judicial economy. See *United States* v. *Smith*, 490 F.2d 789, 794-795 (D.C. Cir. 1974); *United States* v. *Bamberger*, 456 F.2d 1119, 1131 (3d Cir. 1972), cert. denied, 413 U.S. 919 (1973); 3 W. LaFave, *supra*, at 251. If the issue is raised in the trial court, the trial judge may be able to resolve the matter to the defendant's satisfaction. See *United States* v. *Gagnon*, 470 U.S. at 529. Or the prosecutor might decide to forgo a particular course of conduct in order to eliminate the possibility of inserting a reversible error into the record. See generally *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *Wainwright* v. *Sykes*, 433 U.S. at 89. In either case, a contemporaneous objection would eliminate the need for an appellate reversal and a second trial on the same criminal charges.

In this case, there are two possible arguments to support respondent's claim that she should be exempt from Rule 51. First, the Ninth Circuit believed that she was not required to express her view regarding jury selection because an objection would have been futile in light of Ninth Circuit precedent. Second, respondent has contended that the failure of the district judge to preside at voir dire was "plain error" under Federal Rule of Criminal Procedure 52(b) and thus may be noticed on appeal. Neither argument has merit.

b. The Ninth Circuit held that respondent was not required to express a wish to have a district judge preside at voir dire because, in the court's view, there was a " 'solid wall of circuit authority' which would have prevented the district court from correcting the alleged error." App., *infra*, 10a (quoting *Guam* v. *Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988)). There is reason to doubt whether "a solid wall of circuit authority" is ever an exception to the requirement that an issue be raised in the district court. Rule 51 does not expressly set out such an exception. And this Court held in *Engle* v. *Issaac*, 456 U.S. 107 (1982), that contrary and binding state authority was not a sufficient cause for a defendant's failure to present a constitutional objection to a state court. In holding that the failure to object precluded federal habeas review, the Court stated: "[T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Id.* at 130.

Nevertheless, this case does not present the question whether a defendant must make a clearly futile objection to an action of the district court that is mandated by the court of appeals. If there is such an exception, it is surely "very narrow." *Guam* v. *Yang*, 850 F.2d at 512 n.8. The exception would apply only in a case where an objection would be pure ritual—*i.e.*, where the district judge is bound by precedent in his circuit to follow a prescribed course of action. In such a case, none of the reasons underlying Rule 51 would apply because the defendant would not be in a position to make a tactical choice (there would be only one available option) and the trial court would not be free to correct any error (it would be bound by higher precedent). Thus, the courts of appeals that have excused the failure to object on the ground of a "solid wall of circuit authority" have done so in cases in which the trial court's action was compelled. See, *e.g.*, *United States* v. *Liquori*, 438 F.2d 663, 665 (2d Cir. 1971); *Martone* v. *United States*, 435 F.2d 609, 610-611 (1st Cir. 1970).[9]

---

[9] The Ninth Circuit itself recognized as much in *Guam* v. *Yang*, *supra*, when it stated that this "narrow exception only applies * * *

In this case, however, the district court's action was not mandated by binding circuit precedent. In *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), cert. denied, 474 U.S. 847 (1985), and *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986), the Ninth Circuit held that the Federal Magistrates Act vested district courts with discretion to delegate jury selection to magistrates. Nothing in those decisions hinted that district judges were required to—or even should—make such a delegation. Thus, there plainly was not a "solid wall of circuit authority" preventing the district court from conducting jury selection at respondent's trial. Indeed, prior to *Gomez* there were examples where a district judge in Hawaii would grant a defendant's request that the judge conduct voir dire. See 87-1282 Gov't C.A. Supp. Br. at 6 (referring to *United States* v. *Rewald*, Cr. 84-02417 (D. Haw.).[10] Accordingly, Rule 51 required respondent to "make[] known to the court the action" that she desired in order to preserve for appellate review her claim that the district judge should have presided over jury selection.

The rationale underlying the rule requiring a litigant to make her preferences known to the trial court is fully applicable in this case. For tactical reasons, a defendant might prefer that a magistrate conduct voir dire. There may be cases in which defense counsel believes that the magistrate would be more willing than a district judge to allow counsel to question prospective jurors. Or a particu-

---

when a wall of binding authority squarely precludes the trial court from correcting an error." 850 F.2d at 512 n.8.

[10] There are similar examples from other districts in which magistrates ordinarily conducted voir dire. The panel in *United States* v. *Lopez-Pena*, 891 F.2d 490 (1st Cir. 1989), reh'g granted (Feb. 9, 1990), described such a case in the District of Rhode Island.

lar defense lawyer might believe that the magistrate's view of qualified jurors is more favorable to the defendant than the district judge's view. In this very case, there are reasons to believe that the defendant was quite happy to have the magistrate preside at voir dire. The magistrate sustained defense counsel's objection to a question proposed by the government, and the magistrate asked an additional question of the venire at respondent's request. Hence, respondent should not be able to remain silent, proceed with jury selection before a magistrate who rules in her favor twice, and later claim that the district court erred in not conducting voir dire itself.

In sum, if respondent had wanted the district court to conduct voir dire, she should have said so. Because she did not, this case is exactly like many other cases in which the defendant's silence meant that he forfeited the right on appeal to claim that the district court erred in adopting a particular discretionary choice. See, *e.g.*, *United States* v. *Kirkland*, 637 F.2d 654 (9th Cir. 1980) (defendant could not question joinder where he did not move for severance); *United States* v. *Brown*, 493 F.2d 485 (5th Cir.) (defendant did not object to dispersal of jury after final argument), cert. denied, 419 U.S. 865 (1974); *United States* v. *Woodner*, 317 F.2d 649 (2d Cir.) (defendant failed to object to manner in which jurors' hardship excuses were granted), cert. denied, 375 U.S. 903 (1963).

c. Federal Rule of Criminal Procedure 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the [district] court." Respondent has contended that the delegation of jury selection to a magistrate is such a "plain error."[11] That contention is also without merit.

---

[11] The court of appeals did not expressly rest its judgment on that ground, but did state that the *Gomez* Court apparently did not intend

In *United States* v. *Frady*, 456 U.S. 152 (1982), the Court held that Rule 52(b) is a narrow exception to the contemporaneous-objection rule—one that "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.* at 163 n.14. The plain error rule should be used "to correct 'only particularly egregious errors,' those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citations omitted). This stringent test for "plain error" applies equally to all errors—whether founded upon the Constitution, a statute, or rule. See, *e.g.*, *id.* at 16-17 & n.13; *Levine* v. *United States*, 362 U.S. 610, 619 (1960).

The courts have consistently held that defendants have forfeited important statutory and constitutional rights in cases in which there was no miscarriage of justice. See, *e.g.*, *United States* v. *Figueroa*, 818 F.2d 1020, 1025 (1st Cir. 1987) (defendant forfeited claim that he was not brought before magistrate without unnecessary delay); *United States* v. *Bayko*, 774 F.2d 516, 517-518 (1st Cir. 1985) (forfeited *ex post facto* argument); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (forfeited double jeopardy defense), cert. denied, 472 U.S. 1017 (1985); *United States* v. *Coleman*, 707 F.2d 374, 376 (9th Cir.) (forfeited Fifth Amendment claim), cert. denied, 464 U.S. 854 (1983); *United States* v. *Surridge*, 687 F.2d 250, 255 (8th Cir.) (forfeited Fourth Amendment objection), cert. denied, 459 U.S. 1044 (1982).[12]

"to limit the broad, definitive rule it announced to" a case where the defendant objected to the magistrate's conducting voir dire. App., *infra*, 9a.

[12] In *Gomez*, the Court held that the error of delegating jury selection to a magistrate over the defendant's objection could not be "harmless error." 109 S. Ct. at 2248. But it is well settled that the plain error standard is a much more stringent test for a defendant to satisfy. See *United States* v. *Thame*, 846 F.2d 200 (3d Cir.), cert. denied, 109 S. Ct. 314 (1988); *United States* v. *Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Blackwell*, 694 F.2d 1325, 1341 (D.C. Cir. 1982). This is true because there may be cases where it is impossible to say that an error was harmless beyond a reasonable doubt but where it is clear that there was no miscarriage of justice. See *United States* v. *Thame*, 846 F.2d at 207 ("Although we do not believe that the error was sufficiently minor to be harmless beyond a reasonable doubt, we also do not believe that it was sufficiently major that a miscarriage of justice will result if the conviction is not reversed."). The difference in the two standards reflects the fundamental premise of our adversarial system that litigants must make their views known to the trial court.

Judged by the high "miscarriage of justice" standard, the district court's delegation of jury selection to a federal magistrate was not plain error in this case. Magistrates in the District of Hawaii had gained substantial experience over the years in presiding at voir dire. The record in this case shows that the magistrate gave routine instructions to the prospective jurors and asked typical questions of the venire. The magistrate gave the parties the number of peremptory challenges allowed under Federal Rule of Criminal Procedure 24. See 4/27/87 Tr. 2. The record also shows that the magistrate sustained respondent's only objection during voir dire, and he asked a question requested by respondent. Respondent's counsel stated that he was satisfied with the manner in which the jury was selected. 4/27/87 Tr. 71. The balance of petitioner's trial was conducted before the district judge, and the evidence of petitioner's guilt was overwhelming. Accordingly, the jury's guilty verdicts did not result in a miscarriage of justice that may be corrected under Rule 52(b). See *United States* v. *Wey*, No. 89-2106 (7th Cir. Feb. 15, 1990) (jury selection by magistrate was not plain error); *United States* v. *DeFiore*, 720 F.2d 757 (2d Cir. 1983) (same), cert. denied,

466 U.S. 906 (1984); *United States* v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983) (same).

3. The courts of appeals have taken divergent approaches to cases in which the defendant did not object to a magistrate's presiding at voir dire. As we have described, the Ninth Circuit in this case held that no objection was necessary to raise the *Gomez* claim on appeal. The Second Circuit, by contrast, has ruled that it will not reverse convictions where the defendant did not object to the magistrate's role. In *United States* v. *Mang Sun Wong*, 884 F.2d 1537 (1989), cert. denied, No. 89-5949 (Feb. 20, 1990), the Second Circuit refused to reverse a defendant's conviction where he had given his "explicit consent" to "the magistrate's selection of a jury." *Id.* at 1546.[13] In *United States* v. *Vanwort*, 887 F.2d 375 (1989), petitions for cert. pending, Nos. 89-1084, 89-6313, the Second Circuit, without expressly discussing the plain error doctrine, extended its decision in *Mang Sun Wong* to a case in which the defendants simply failed to object. The Seventh Circuit recently agreed that it was not "plain error" for a court to delegate jury selection to a magistrate in a case where the defendant did not object. See *United States* v. *Wey*, No. 89-2106 (Feb. 15, 1990).[14]

The Third Circuit has taken a different approach but ultimately reached the same result as the Second and Seventh Circuits. In *Government of the Virgin Islands* v.

[13] Judge Altimari dissented because he believed that "a magistrate has no power to seat a jury in a felony case with or without the defendant's consent." 884 F.2d at 1546.

[14] A panel of the First Circuit in *United States* v. *Lopez-Pena*, 890 F.2d 490 (1989), held that the delegation of jury selection to a magistrate was not a plain error that required reversal in the absence of an objection. Judge Aldrich dissented. On February 9, 1990, the First Circuit vacated the panel decision and set the case for reargument before the entire court.

Williams, 892 F.2d 305 (1989), the Third Circuit first ruled that the defendant was not barred by the contemporaneous objection rule from raising a *Gomez* issue on appeal. The court reasoned that such an issue is in the nature of a "jurisdictional objection" that may be raised at any time. *Id.* at 310. Nevertheless, the Third Circuit concluded that there was no error in that case because the Federal Magistrates Act permits a magistrate to conduct voir dire if the defendant consents. *Id.* at 310-311.[15]

We believe that this case presents a suitable vehicle for resolving two of the most important post-*Gomez* issues—whether a defendant's lack of objection should be excused on the ground of futility, and whether the delegation of jury selection to a magistrate before *Gomez* was "plain error" under Rule 52(b). The "futility" issue is not squarely presented by a case from any other circuit, but it is important because it affects so many convictions in the Ninth Circuit—in particular, almost every conviction in the District of Hawaii. And the plain error question has widespread significance to many appellants throughout the circuits who have raised a *Gomez* issue even though they did not object at trial.

[15] Judge Mansmann concurred only in the judgment. She reasoned that the district court erred in delegating jury selection to a magistrate, but that there was no plain error requiring reversal in the absence of an objection.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
BRIAN J. MARTIN
Assistant to the Solicitor General
J. DOUGLAS WILSON
Attorney

FEBRUARY 1990

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-1282
D.C. No. 87-00079 RJK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DARLINA K. FRANCE, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Hawaii
Robert J. Kelleher, District Judge, Presiding

Argued November 10, 1988—Honolulu, Hawaii
Submitted July 7, 1989

[Filed Sept. 13, 1989]

Before: Dorothy W. Nelson, Stephen Reinhardt and Charles Wiggins, Circuit Judges.

Opinion by Judge Reinhardt

OPINION

REINHARDT, Circuit Judge:

Darlina France shot her husband after an argument. The event appears to have been merely the most violent moment in a relationship that had for some time been less than idyllic. Since the shooting occurred on the military base where the couple lived, it fell within the "special territorial jurisdiction" of the United States, *see* U.S.C. § 113, and made France liable for a federal offense. The Government charged her with assault with intent to murder, assault resulting in serious bodily injury, 18 U.S.C. § 113 (a), (f), and using a firearm in the commission of a felony, 18 U.S.C. § 924(c). She was found guilty on two assault-related charges and on the weapons count. The conviction under § 924(c) carried with it a five-year mandatory prison term, without the possibility of probation or parole.

Because of the circumstances surrounding the offense, events in the district court, and concerns about the constitutionality of § 924(c) as applied to France, we ordered supplemental briefing in this case after argument. In the interim, the Supreme Court decided *Gomez v. United States*, ____ U.S. ____ 109 S. Ct. 2237 (1989), holding that it is reversible error for federal magistrates to conduct jury selection in felony trials. A magistrate conducted the voir dire in France's trial. We conclude that France's case falls within the *Gomez* rule, and we reverse her conviction. We address the broader concerns which we have had about this case only in passing at the end of our discussion.

I

The Government and France offer starkly disparate pictures of the events which led up to the shooting. The Government emphasizes that France had apparently been

involved in violent incidents with her two previous husbands and that she was angered when, the day before the shooting, her husband had knocked over their Christmas tree and, on the day of the shooting, had taken a beer from her. At trial, France described the situation somewhat differently. She recounted a history of physical abuse at the hands of a previous husband and described how, in the midst of an argument and just prior to the shooting, her current husband had attacked her.

The parties stress different facts concerning the actual shooting as well. The Government makes much of the fact that Mr. France was about 20 feet from his wife when he was shot, while France highlights the fact that her husband had turned around and was beginning to walk toward her once more when she fired. Whatever the case, France shot her husband in the shoulder with a gun he had bought for her some months before. She then went to her husband and told one of her two daughters to call an ambulance. At this point, France appears to have made several contradictory statements, repeating to law enforcement officers that she had not meant to shoot her husband, while also stating that "he [her husband] took my beer and that was the last straw."

At trial, Mr. France testified that he believed the shooting to have been accidental, given the gun's light trigger pull. He also testified that he and his wife had reconciled, that they loved each other and that he had asked that she not be prosecuted. The Government refused to accede to this request and chose to prosecute France under § 924(c), which carries a mandatory five-year prison sentence without possibility of probation or parole, as well on the two felony assault counts. Jury selection was conducted by a federal magistrate, without objection from France. The jury convicted France of assault with a deadly weapon, a lesser included offense of assault with intent to

to commit murder under 18 U.S.C. § 113(a), assault resulting in serious bodily injury under 18 U.S.C. § 113(f), and using a firearm in relation to a crime of violence under 18 U.S.C. § 924(c).

Then followed a most enlightening sentencing hearing. Judge Kelleher, expressing understandable hostility to his obligation to impose a five-year, no-probation, no-parole sentence on France, criticized the statute's relegation of the sentencing judge to an individual who gives only a "*pro forma* performance." He continued by stating that he "might as well go fishing on the day of the sentence and ask the clerk to pronounce sentence." He explicitly told France that he felt her case did not warrant a sentence of five years in prison without the possibility of parole. He then imposed the sentence required by § 924(c), sentencing France to concurrent three-year terms of probation for her two convictions under § 113.

France appealed. We ordered supplemental briefing on issues concerning the constitutionality of § 924(c), and allowed the National Association of Criminal Defense Lawyers to file an *amicus curiae* brief on France's behalf. Meanwhile, the Supreme Court decided *Gomez*. We then granted the motion of France's attorney, a public defender, to file a supplemental brief concerning *Gomez*, and ordered the government to respond. As we conclude that the decision in *Gomez* requires us to reverse France's conviction, we do not reach the constitutional issues ably briefed by the parties.

II

A. *Gomez*

In *Gomez*, the Supreme Court examined whether a provision of the Federal Magistrates Act ("Act") which allows magistrates to perform "such additional duties as are not inconsistent with the Constitution and laws of the United

States," 28 U.S.C. § 636(b)(3), empowers magistrates to conduct jury selection in felony trials. 109 S. Ct. at 2239. The Court noted that Gomez and the other petitioners had initially objected to having a magistrate conduct voir dire and jury selection, but had never demonstrated or claimed that they were prejudiced by the magistrate's action. *Id.* After examining the structure and history of the Act, the *Gomez* court concluded that jury selection was not within the " 'range of duties' that Congress intended magistrates to perform." *Id.* at 2242 (quoting *Mathews v. Weber*, 423 U.S. 261, 270 (1976)).

The Court emphasized three factors in reaching its result. First, it noted that Congress had specifically authorized magistrates "to conduct trials of civil matters and of minor criminal cases" and determined that this "carefully defined grant of authority" should be construed as an implicit withholding of the authority to preside at a felony trial." 109 S. Ct. at 2245. Second, it examined in detail the role that jury selection occupies in a criminal trial, observing that it represented a "critical stage of the criminal proceeding," with voir dire the "primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice." *Id.* at 2246 (citing *Lewis v. United States*, 146 U.S. 370, 374 (1892), and *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)). Finally, the Court discussed the degree to which the individual who conducts voir dire must make sensitive evaluations of "not only spoken words but also [the] gestures and attitudes of all participants to ensure the jury's impartiality," and expressed "serious doubts that a district judge could review the[ese] function[s] meaningfully." 109 S. Ct. at 2247. Based on these observations, the court concluded that Congress had not given magistrates the power to conduct jury selection in a felony trial.

The Court, in the final portion of its opinion, stated clearly that "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside," *id.* at 2248, placed the error in *Gomez* in the category of errors that "'"can never be treated as harmless,"'" *Id.* (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967))). It thus ended its opinion by ruling that *Gomez* error was not susceptible to harmless error analysis. 109 S. Ct. at 2248.

Having described the rationale and holding of *Gomez*, we turn now to the task of applying it to France's case.

B. Application of *Gomez*

When we ordered the government to respond to the *Gomez* brief filed by France's public defender, we specifically mandated that the government address issues of retroactivity and waiver.[1] We have reviewed the government's arguments and conclude (1) that *Gomez* must be

[1] The government in its brief advanced the view that the fact that district judges in Hawaii are "readily available" to review the behavior of magistrates during voir dire distinguishes France's case from the situation in *Gomez*. We reject this argument on two grounds. First, the Supreme Court's careful description of the role of the judge in conducting voir dire, *supra*, does not invite the sort of distinction between "ready" and "less than ready" availability that the government seeks to draw. Either the judge is there conducting voir dire or he is not; if he is not there—no matter how close to the courtroom he may be or how soon he is consulted—the potential for "meaningful review" has been lost. *See Gomez*, 109 S. Ct. at 2247. Second, the Supreme Court explicitly ruled that magistrates lack the *power* to conduct voir dire in a felony trial. Thus, in every case in which a magistrate conducts voir dire the defendant is deprived of (in this case) her "basic" rights "to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." *Id.* at 2248.

applied (at least) to all convictions not yet final, and (2) that the fact that France did not object to the magistrate conducting jury selection does not serve to waive her right to a reversal under *Gomez*.

(1)

The Supreme Court has made clear that "as a rule, judicial decisions apply 'retroactively,'" *Solem v. Stumes*, 465 U.S. 638, 642 (1984) ("*Stumes*") (quoting and citing *Robinson v. Neil*, 409 U.S. 505, 507-508 (1973)). Retroactivity is "most appropriate" in those cases where a new rule "is designed to enhance the accuracy of criminal trial." *Stumes*, 465 U.S. at 643 (new constitutional rule); *see also Williams v. United States*, 401 U.S. 646, 653 & n.6 (1971) (plurality opinion). Although the Court has usually discussed retroactivity in the context of new constitutional rules, we believe that the analysis of *Stumes* and *Williams* applies to *Gomez* as well. The Supreme Court, although its decision was, in the end, one of statutory construction, made clear that its holding was compelled by the notion that any other result might well run afoul of the Constitution by authorizing the deprivation of one of the "basic rights" of a criminal defendant. *See Gomez*, 109 S. Ct. at 2241, 2246-48. Moreover, the *Gomez* court's explicit discussion of the potential for incurable error in jury selection should magistrates select a jury in a felony trial over which a district judge would ultimately preside, *id.* at 2247, demonstrates that its decision was grounded in notions of trial "accuracy" making the *Gomez* rule precisely the sort of holding "most appropriate" for retroactive application. *Stumes*, 465 U.S. at 643.

Finally, we note that the question resolved in *Gomez* had never previously been addressed by the Supreme Court. Indeed, the Court explicitly noted the conflict among the courts of appeals on the question, citing two of

our own cases (which it ultimately overruled, *infra*) as examples of the view it rejected. 109 S. Ct. at 2240 & n.7. The *Gomez* result thus represents a newly announced rule concerning the conduct of felony trials. As such, it is a rule which must be applied retroactively. In the words of the Supreme Court in *Griffith v. Kentucky*, ____ U.S. ____, 107 S. Ct. 708, 716 (1987) ("*Griffith*"):

> [A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the rule constitutes a "clear break" with the past.

Accordingly, we conclude that the rule announced in *Gomez v. United States* must be applied "to all cases pending on direct review or not yet final" on July 7, 1989, the date on which the mandate in *Gomez* issued. "Final" in this context refers to "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 107 S. Ct. 712 n.6.[2]

We next turn to the question whether France waived her right to reversal under *Gomez* by not raising an objection to having the magistrate select the jury for her trial. The government relies on two aspects of *Gomez* to support the view that we should find waiver here. It first notes that the Court stated (in its recitation of the facts) that the petitioners in *Gomez* did object when magistrates selected their juries. 109 S. Ct. at 2239. Second, the government quotes a snippet of the concluding sentence in *Gomez*

[2] As we are not called upon to decide it in this case, we leave open the question whether the *Gomez* decision should be afforded "complete" retroactive effect and applied to convictions pending on collateral review. *See Teague v. Lane*, __ U.S. __, 109 S. Ct. 1060 (1989).

where the Court stated that harmless error analysis would not apply in a case "in which, despite the defendant's objection . . . [a magistrate] exceeds his jurisdiction by selecting a jury." *Id.* at 2248. The government suggests that these observations are sufficient to demonstrate that contemporaneous objection is required to preserve one's right to challenge the magistrate's conduct of voir dire at some later point. We do not find the government's argument persuasive.

Looking first to the *Gomez* decision itself, we find absolutely no indication in the tenor or the text of the opinion to suggest that the Court relied on, or did more than note—in the interest of providing a full and accurate description of the facts before it—the fact the petitioners had objected to the magistrate's conducting voir dire. The snippet recited above merely recapitulates the facts of the case as a descriptive matter. We do not think that the passage can reasonably be read to suggest that the Court intended to limit the broad, definitive rule it announced to the precise facts before it.

We have a far more tangible reason for our holding, however. As the *Gomez* court itself noted, our court had previously ruled in two cases that it was not error for magistrates to conduct voir dire in felony trials. 109 S. Ct. 2240 n.7 (citing *United States v. Peacock*, 761 F.2d 1313 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985); *United States v. Bezold*, 760 F.2d 999 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986)). Thus the uniform, settled rule applicable to France at the time of her trial was that the magistrate was empowered to select her jury. As *Gomez* now informs us, our view was erroneous. The only question, therefore, is whether France should be penalized for abiding by the controlling law at the time.

We have held in two decisions *en banc* that a party does not waive its right to challenge a jury instruction if it fails

to register a contemporaneous objection—even when contemporaneous objection is required by procedural rule—if there is a "solid wall of circuit authority" which would have prevented the district court from correcting the alleged error. *Guam v. Yang*, 850 F.2d 507 n.8 (9th Cir. 1988) (en banc) ("*Yang II*"); *United States v. Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970) (en banc) (Fed. R. Crim. P. 30) ("*Scott*"). The justifications for this rule are simple. Objecting in the trial court to a clearly defined rule of the circuit is futile, inasmuch as the trial court cannot overrule authority binding on it. Furthermore, requiring parties to object to aspects of the trial that have already been approved by the court of appeals would work the " 'unhappy result' " of " 'encourag[ing] defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned.' " *Yang I*, 850 F.2d at 512 n.8 (quoting *Scott*, 425 F.2d at 57-58).

Even though the issue before us does not involve a failure to object to a jury instruction, we believe, contrary to the government's argument, that the rule of *Yang II* and *Scott* is not limited to the narrow facts of those cases and is applicable to France's case. We note first that the justifications for the rule in our earlier *en banc* cases apply with at least equal force here. Second, and equally important, the rule announced in *Gomez* is one that touches on one of the most "basic rights" of the accused, the right to a fair and accurate trial. As we implied when we framed the question, *supra* at 11, it seems to us at best unseemly, and at worst irresponsible, to penalize France for following the law as it existed at the time her jury was selected. Finally, it is incongruous to hold that a rule that is "designed to enhance the accuracy of a criminal trial," *Stumes*, 465 U.S. at 643, and which must, therefore, be given broad retroactive application, can be waived because a defendant did

not guess that the law would change some time after the error was committed.

We conclude in this case that France was presented with a "solid wall of circuit authority" and that an exception similar to that recognized in *Yang II* and *Scott* is applicable. *Peacock* and *Bezold* had already decided, erroneously, that magistrates could conduct voir dire in felony trials. Any objection to the magistrate performing voir dire in France's case would, therefore, clearly have been futile. We therefore hold that France did not waive her right to object, once the Supreme Court's decision in *Gomez* had been rendered, to having a magistrate select her jury.

III

Since we have concluded that the *per se* rule of reversal announced in *Gomez* applies to all cases not final when *Gomez* was decided and that France has not waived her ability to avail herself of that rule, we reverse her conviction. We offer only two final observations. The first concerns the government's decision to prosecute France under § 924(c). While we understand that courts must give the Executive extremely wide latitude in choosing the statutes under which it seeks to indict and prosecute offenders, we, as the district judge apparently was, have been left with the sense that Darlina France may not be the sort of hardened, violent offender whom Congress had in mind when it enacted the Comprehensive Crime Control Act of 1984, of which § 924 was a part. *See* S. Rep. No. 98-225, 98th Cong., 2d Sess. 312-13, *reprinted in* 1984 U.S. Code. Cong. & Admin. News, 3182, 3490-91. We doubt that the purposes of punishment, even society's interest in retribution against those who violate its norms, are well served by imprisoning France for five years, separating her from her daughters and the husband, her "victim," with whom she

has apparently reconciled. *See* W. Shakespeare, *Merchant of Venice*, Act IV, scene 1, at 184 *et seq*.

Finally, we add a word about the public defender who represented France. Throughout these lengthy proceedings, he has represented his client with vigor and diligence. His supplemental brief on the constitutionality of § 924 was both a substantial and an impressive undertaking although, ironically, it turned out to be irrelevant to our disposition of the case. His *Gomez* brief, which appeared only a few weeks after the decision was handed down, was equally impressive, and was dispositive. In an era when the offices of federal public defenders will likely bear both a greater share of the burden of defending federal defendants and a greater responsibility for securing the rights of the accused, *see Caplin & Drysdale, Chartered v. United States*, __ U.S. __, 109 S. Ct. 2667, 2677 (1989) (dissenting opinion), it seems appropriate to commend exceptional effort in an unusual case. This case was unusual and the public defender's efforts were exceptional. The conviction is

REVERSED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 87-1282
Cr. No. 87-00079 RJK
(USDC – Hawaii)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

DARLINA K. FRANCE, DEFENDANT-APPELLEE

[Excecuted Oct. 20, 1989]

DECLARATION OF DANIEL BENT

I, DANIEL BENT, declare and say:

1. I am the United States Attorney for the District of Hawaii and have been since 1982.

2. Since approximately the mid-1980's the United States District Court for the District of Hawaii has had magistrates presides over virtually all jury selection proceedings.

3. I have read this Court's decision in this case and believe that if it remains as controlling precedent in its present form, there will be approximately twenty-seven (27) cases involving approximately forty-eight (48) defendants that will be reversed and remanded for retrial.

4. The total amount of time consumed in these trials has been estimated to be approximately seventy-three (73) attorney work-weeks, which does not include any preparation time and which includes one day per week when the District Court normally does not hold trial.

5. The impact of the application of this Court's present decision in this matter will thus have a severe impact on the administration of justice in the District of Hawaii both in terms of personnel and cost, even if it is assumed that not all of the cases will actually be retried due to plea agreements, or other circumstances that one could reasonably expect to interfere with the retrial of cases that have been pending appeal for up to two years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20th, 1989, at Honolulu, Hawaii.

/s/ Daniel Bent
DANIEL BENT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-1282
D.C. No. 87-00079 RJK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DARLINA K. FRANCE, DEFENDANT-APPELLANT

[Filed Jan. 16, 1990]

Appeal from the United States District Court
for the District of Hawaii
Robert J. Kelleher, District Judge, Presiding

Before: Nelson, Reinhardt, and Wiggins, Circuit Judges.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00776

ORIGINAL

ORIGINAL

Supreme Court, U.S.
FILED
APR 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

MICHAEL R. LEVINE
Federal Public Defender
District of Hawaii
Room 7102, 300 Ala Moana Blvd.
Post Office Box 50269
Honolulu, Hawaii 96850
Telephone: (808) 541-2521
(FTS) 551-2521
Attorney for Respondent
DARLINA K. FRANCE

NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The defendant, DARLINA K. FRANCE, through counsel, moves this Court for permission to proceed in forma pauperis. This motion is based on the attached declaration of counsel.

DATED: Honolulu, Hawaii, April 2, 1990.

MICHAEL R. LEVINE
Federal Public Defender
District of Hawaii
Room 7102, 300 Ala Moana Blvd.
Honolulu, Hawaii 96850
Telephone: (808) 541-2521

Attorney for Respondent
DARLINA K. FRANCE

NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

DECLARATION OF COUNSEL

I, MICHAEL R. LEVINE, declare as follows:

1. I am the Federal Public Defender for the District of Hawaii.

2. Pursuant to the Criminal Justice Act 18 U.S.C. § 3006A, I have been representing the respondent Darlina K. France on appeal.

3. That to the best of my knowledge respondent continues to qualify for appointed counsel under the Act and is eligible to proceed in forma pauperis.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

DATED: Honolulu, Hawaii, April 2, 1990.

MICHAEL R. LEVINE
Federal Public Defender
District of Hawaii
Room 7102, 300 Ala Moana Blvd.
Post Office Box 50269
Honolulu, Hawaii 96850
Telephone: (808) 541-2521

NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

CERTIFICATE OF SERVICE

I, RUTH G. FULLERTON, hereby certify that a true and exact copy of the foregoing document was duly mailed, postage prepaid to the following offices:

KENNETH W. STARR
Solicitor General
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

DATED: Honolulu, Hawaii, April 2, 1990.

RUTH G. FULLERTON
Legal Secretary to

MICHAEL R. LEVINE
Federal Public Defender
District of Hawaii

Attorney for Respondent
DARLINA K. FRANCE

NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

BRIEF FOR RESPONDENT DARLINA K. FRANCE
OPPOSING PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL R. LEVINE
Federal Public Defender
District of Hawaii
Room 7102, 300 Ala Moana Blvd.
Post Office Box 50269
Honolulu, Hawaii 96850
Telephone: (808) 541-2521
(FTS) 551-2521
Attorney for Respondent
DARLINA K. FRANCE

ISSUE PRESENTED

Should this Court grant certiorari to review United States v. France, 886 F.2d 223 (9th Cir. 1989) which held that a "solid wall" of Ninth Circuit precedent rendered futile any objection by France to jury selection by a magistrate?

TABLE OF CONTENTS

Table of Authorities.....iii-vi

Issue Presented.....i

Opinion Below.....2

Jurisdiction.....2

Statement of facts and procedure.....2

1. The facts.....2

2. Procedure pertaining to jury selection.....5

Arguments against granting the petition.....7

1. Certiorari is not justified because France rests on the well recognized doctrine that futility excuses a failure to object, and France creates no conflict among the circuits.....7

2. The impact of France on the criminal justice system is not as significant as the government suggests and, in any event, is a consequence of the government's own policies.....13

3. Because the issue of "plain error" is not raised in the case at bar, certiorari is not warranted to decide that question.....14

Conclusion.....17

Appendix A

Appendix B

TABLE OF AUTHORITIES

CASES — PAGE(S)

Boag v. MacDougall,
454 U.S. 364 (1982) 8

Butler v. McKellar,
110 S. Ct. 1212 (1990) 8

California v. Freeman,
109 S. Ct. 854 (1989) 17

Callanan v. United States,
881 F.2d 229 (6th Cir. 1989) 11,12

Engle v. Isaac,
456 U.S. 107 (1982) 11,14

Gomez v. United States,
109 S. Ct. 2237 (1989) 5

Government Of The Virgin Island v. Williams,
892 F.2d 304 (3d Cir. 1989) 13,14

Grosso v. United States,
390 U.S. 62 (1968) 9,15

Guam v. Yang,
850 F.2d 507 (9th Cir. 1988) (en banc) 6,9

In Re Becraft,
885 F.2d 547 (9th Cir. 1989) 4,11

In Re Howell,
731 F.2d 624 (9th Cir. 1984),
cert. denied, 419 U.S. 933 (1984) 15

Ingber v. Enzer,
841 F.2d 450 (2d Cir. 1988) 9,11

Jett v. Zink,
474 F.2d 149 (5th Cir. 1973) 8

Miranda v. Arizona,
384 U.S. 436 (1966) 6

Mistretta v. United States,
109 S. Ct. 647 (1989) 17

TABLE OF AUTHORITIES
(cont'd)

CASES — PAGE(S)

O'Connor v. New Jersey,
405 F.2d 632 (3d Cir.) 9

O'Connor v. Yeager,
395 U.S. 923 (1969) 9

Ohio v. Roberts,
448 U.S. 56 (1980) 10

Russell v. Rolfs,
893 F.2d 1033 (9th Cir. 1990) 8

Singleton v. Wulff,
428 U.S. 106 (1976) 15

Smith v. Estelle,
602 F.2d 694 (5th Cir. 1979),
aff'd, 451 U.S. 454 (1981) 9

United States v. Baron,
721 F. Supp. 259 (D. Haw. 1989), appeal pending 10

United States v. Bezold,
760 F.2d 999 (9th Cir. 1985),
cert. denied, 474 U.S. 1063 (1986) 4,7

United States v. Byers,
740 F.2d 1104 (D.C. Cir. 1984) 9,10,16

United States v. Clark,
475 F.2d 240 (2d Cir. 1973) 10

United States v. Fay,
333 F.2d 12 (2d Cir. 1969) (en banc),
aff'd, 381 U.S. 654 (1965) 9

United States v. France,
886 F.2d 228 (1989) 1,11

United States v. Hayden,
860 F.2d 143 (9th Cir. 1988) 16

United States v. Indiviglio,
352 F.2d 276 (2d Cir. 1965) 9

United States v. Liguori,
438 F.2d 663 (2d Cir. 1971) 9

CASES — PAGE(S)

United States v. Lopez-Pena,
890 F.2d 490 (1st Cir. 1989)
Reh'g granted (Feb. 9, 1990).....7,13

United States v. Musacchia,
slip op. no. 88-1491
(2d Cir. March 21, 1990).....7,13,17

United States v. Mang Sung Wong,
884 F.2d 1537 (2d Cir. 1989)
cert. denied, 110 S. Ct. 1140 (1990),
pet. for reh. pending.....8,13

United States v. Peacock,
761 F.2d 1313 (9th Cir.),
cert. denied, 474 U.S. 847 (1985).....4,7

United States v. Rewald,
889 F.2d 836 (9th Cir. 1989).....12

United States v. Rivera,
513 F.2d 519 (2d Cir. 1975).....10

United States v. VanWort,
887 F.2d 375 (2d Cir. 1989),
pet. for cert. pending, Nos. 89-1084, 89-6313.....13

United States v. Wey,
895 F.2d 429 (7th Cir. 1990).....13,17

United States v. Whitten,
706 F.2d 1000 (9th Cir. 1983),
cert. denied, 456 U.S. 1100.....16

Walters v. National Association of Radiology Services,
473 U.S. 305 (1985).....17

Watt v. Alaska,
451 U.S. 259 (1981).....8

Watt v. Page,
452 F.2d 1174 (10th Cir.),
cert. denied, 405 U.S. 1070 (1972) 10

RULES AND STATUTES — PAGE(S)

Rule 52(b), Fed. R. Crim. P.....14

18 U.S.C. § 113(a).....3

18 U.S.C. § 113(f).....3

18 U.S.C. § 924(c).....3

28 U.S.C. § 1254(1).....1

28 U.S.C. § 2106 15

OTHER AUTHORITIES

1988 Annual Report of the Director of the
Administrative Office of the United States Courts.....13

NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

BRIEF FOR RESPONDENT DARLINA K. FRANCE OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-12a)[1] is reported at 886 F.2d 223.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1989, and the government's petition for rehearing, as well as a suggestion for rehearing en banc, was denied on January 16, 1990. [Pet. App. 15a] Jurisdiction is invoked by the government under 28 U.S.C. § 1254(1).

1 "Pet. App." refers to the appendix to the government's petition.

STATEMENT OF FACTS AND PROCEDURE

1. The Facts

Because the government's statement of facts is seriously deficient and misleading, [Pet. at 2-3], France summarizes the omitted facts as follows:

In December, 1986, Mr. and Mrs. France lived in the Aliamanu military housing area on Oahu, Hawaii together with their two children. According to Mr. France's trial testimony, after a heated domestic argument with the respondent, his wife Darlina France, he started "beating the hell out of her." [Tr. 52, 73] He "grabbed ahold of her throat," and "slammed her up side [sic] the head." Then, he "threw her down on the floor, picked her back up and threw her back again, and slammed her up [sic]." [Tr. 53] Finally, he "threw her down" on broken glass on the floor. [Tr. 54] Mr. France had engaged in brutally assaultive behavior before, having put a former wife in the hospital. [Tr. 73, 310] Mrs. France was particularly vulnerable to this type of violence, since she had been repeatedly and seriously abused by a former husband in a prior marriage [Tr. 73, 309], whom she once shot at to stop his repeated beatings. [Tr. 310, 311]

After the brutal beating by her husband, and believing she would continue to be beaten, [Tr. 345, 353] Mrs. France shot her husband Mr. France in the shoulder with a gun he had given her earlier. Immediately after the shooting, Mrs. France showed great remorse. She rushed over to Mr. France and stated, "Oh my God, I shot you. I didn't mean to." [Tr. 61, 71, 101] She told her daughter to call an ambulance, [Tr. 100, 151, 157] and she begged her husband's forgiveness. [Tr. 61, 71, 101, 151, 157] She later visited Mr. France in the hospital and told him she was "very sorry." [Tr. 63] Mr. France believed his wife; he also believed that the shooting was accidental. [Tr. 64, 67, 201,

205] Mr. France testified that previously he himself had accidentally fired the gun and almost shot himself in the leg, and that the gun had a very light trigger pull. [Tr. 64, 70]

After Mr. France was released from the hospital he resumed living with Mrs. France without incident. [Tr. 63, 79] Mrs. France was assisting Mr. France with his therapy. [Tr. 77, 87] They had a good relationship [Tr. 79], loved each other and were going to stay together. [Tr. 320] Mr. France did not file charges against Mrs. FRANCE and, in fact, requested that she not be prosecuted. [Tr. 79, 201] Notwithstanding the plea of Mr. France not to prosecute his wife, the government charged Mrs. France in Count I with assault with intent to commit murder in violation of 18 U.S.C. § 113(a), and in Count II with assault resulting in serious bodily injury, in violation of 18 U.S.C. § 113(f). Finally, it charged her in Count III with using a firearm during commission of a crime, in violation 18 U.S.C. § 924(c) which, upon conviction, carries a mandatory consecutive five-year sentence without possibility of probation or parole. After a jury trial France was convicted on Count I of the lesser offense of assault with a dangerous weapon in violation of 18 U.S.C. § 113(a), and was found guilty as charged on Counts II and III.

At sentencing before the Honorable Robert J. Kelleher, Mr. France, through written correspondence, urged that his wife not be sent to prison [S.Tr. 15].[2] Judge Kelleher "expressed hostility" to the statute's requirement that he sentence France to the mandatory five-year sentence without parole. France, 886 F.2d at 225, Pet. App. 4a. He said her case did not warrant such a sentence. Id. He said the statute had relegated him to only a "pro forma" performance and that he "might as well go fishing on

2 "S.Tr." refers to the sentencing transcript.

the day of sentence and ask the clerk to pronounce sentence." Id. However, the court felt required by the mandatory penalty provision of 924(c) to impose a five-year sentence without parole on Count III, and he did so.

In France, the Ninth Circuit agreed with Judge Kelleher's views as to the inappropriateness of separating France from her husband and her two children for five years. Furthermore, the court thought that the government's prosecution of France under the five-year mandatory penalty provision of 924(c) was so heartless that it cited to the government Portia's speech on the quality of mercy from Shakespeare's The Merchant of Venice. France, 886 F.2d at 228; Pet. App. at 11a-12a.

2. Procedure Pertaining to Jury Selection

Before France's trial took place, the Ninth Circuit had twice ruled, without dissent, that, regardless of defense objection, magistrates could select a jury in a felony case. The two decisions were United States v. Peacock, 761 F.2d 1313 (9th Cir.)(Kennedy, J.), cert. denied, 474 U.S. 847 (1985), and United States v. Bezold, 760 F.2d 999 (1985), cert. denied, 474 U.S. 1063 (1986). Bezold was litigated by current counsel for France, Michael R. Levine.

After Bezold and Peacock, as the government concedes, it was the "regular practice" of the District of Hawaii to have magistrates select the jury in "virtually all" cases [Pet. at 3,7]. Therefore, when France's jury selection began, her trial counsel made no objection because any objection would have been futile. France, 886 F.2d at 228 (objection "clearly futile"). Indeed, in the Ninth Circuit the raising of meritless objections can be grounds for severe sanctions. See In Re Becraft, 885 F.2d 547 (9th Cir. 1989) (criminal defense lawyer fined $2,500 for

filing frivolous petition for rehearing raising arguments repeatedly rejected by the court). Significantly, however, neither defense counsel nor France gave affirmative consent to the procedure.

After her conviction, France received concurrent terms of probation on each of the two assault charges, but she was sentenced to the five-year mandatory sentence on the 924(c) charge. On appeal, she challenged only the 924(c) conviction. Continuing to believe that raising the magistrate issue would be futile in view of the solid wall of contrary Ninth Circuit authority, France omitted it from her brief to the Ninth Circuit. After oral argument, while the decision in France was pending, this Court decided Gomez v. United States, 109 S. Ct. 2237 (1989).

In Gomez this Court did not reach the constitutional issues but unanimously held that a magistrate has no jurisdiction to preside over jury selection because Congress had not authorized this power. Moreover, even though the defendant in Gomez could show no prejudice, the Court held that, because the defendant had a "basic" right to have a person with jurisdiction preside over a "critical" stage of his trial, harmless-error analysis could "never" be applicable. Gomez, 109 S. Ct. at 2248.

Within three weeks of the Gomez decision, while the appeal in France was still pending, France moved the court of appeals to reverse her conviction because a magistrate had selected the jury. After receiving supplemental briefs, the court reversed France's conviction. It held, first, that Gomez should be applied retroactively to France's case because it was pending on direct appeal.[3] The court then held that France had

3 The government does not take issue with this aspect of the holding. [Pet. at page 4, n.2]

not waived her right to raise the Gomez claim by her failure to object in the district court for two reasons. First, no objection was necessary because Gomez did not require an objection.[4] Second, and most importantly, however, the court held that in view of the Ninth Circuit's "solid wall" of precedent authorizing magistrate voir dire even over a defendant's objection, any objection would have been futile. The court reasoned that requiring a futile objection would be senseless because it would encourage "defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned." France 886 F.2d at 228 (quoting Guam v. Yang, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc).

Finally, citing this Court's language in Gomez, the court of appeals reasoned that the rule announced in Gomez "touches on one of the most basic rights of the accused," France at 228, the right to have an Article III judge preside at jury selection, a "critical" stage of her trial. France, 886 F.2d at 226 (quoting Gomez at 2248). In view of the importance of the right and in view of the "solid wall" of Ninth Circuit precedent which, until Gomez, had authorized the procedure violative of that right, the court in France held that it would be "at best unseemly, and at worst irresponsible" to penalize France for failing to object. France, 886 F.2d at 228.

4 The court of appeals held that Gomez announced a "broad, definitive rule" not dependent upon an objection. France, 886 F.2d at 227. The court of appeals recognized that this Court had referred to the existence of an objection in Gomez, but believed that the Court's holding did not turn on this point. Id.

ARGUMENT

1. Certiorari is not justified because France rests on the well recognized doctrine that futility excuses a failure to object and therefore creates no conflict among the circuits.

Certiorari should be denied in this case because France rests primarily on the Ninth Circuit's unremarkable holding that France's objection to the magistrate's conducting voir dire would have been futile. The court in France pointed to the two previous Ninth Circuit holdings which approved magistrate voir dire even over objection of defense counsel: United States v. Bezold, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986) and United States v. Peacock, 761 F.2d 1313 (9th Cir.) (Kennedy, J.), cert. denied, 474 U.S. 847 (1985). Because it rests on the doctrine of futility, the holding in France does not conflict with that of any other circuit, as grudgingly conceded by the government. See Pet. at 17 ("the 'futility' issue is not squarely presented by a case from any other circuit . . . .") Certiorari cannot, therefore, be justified on the ground that France creates a conflict among the circuits.

Indeed, France has been expressly distinguished by at least two other circuit courts on the ground that it relied on a "solid wall" of authority in the Ninth Circuit which did not exist elsewhere. See United States v. Lopez-Pena, 890 F.2d 490, 497 (1st Cir. 1989) ("[I]n this circuit, unlike in the Ninth, there was no 'solid wall of circuit authority'" which would render the objection futile), reh'g granted, February 9, 1990; United States v. Musacchia, slip. op. no. 88-1491 (2d Cir. March 21, 1990) at pages 18-21 (same).

The government urges that certiorari should be granted because the Ninth Circuit erred in applying the futility doctrine to the instant case. It argues, first, that there is reason to doubt whether futility "ever" justifies a failure to object in the district court. [Pet. at 11] In any event, it argues, the

doctrine was improperly applied here because Bezold and Peacock did not require magistrates to conduct voir dire, but only permitted them to do so even over defense objection.ground.[5]

Even assuming, arguendo, that the Ninth Circuit did err in applying the futility principle, which, as will be shown below, it did not, the government, in effect, asks this Court to grant certiorari merely to correct the Ninth Circuit's error. [Pet. at 11-13] This Court, however, has admonished that it "must never forget that this Court is not a forum for the correction of errors." Boag v. MacDougall, 454 U.S. 364, 367 (1982) (Rehnquist, J., dissenting); see Watt v. Alaska, 451 U.S. 259, 275, n.5 (1981) (Stevens, J., concurring) ("our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases"); cf. Butler v. McKellar, 110 S. Ct. 1212, ___ (1990)(Brennan, J., dissenting) (the court will generally not grant certiorari just because decision below may be erroneous). Thus, certiorari is not justified merely to correct the alleged error in France.

Moreover, the Ninth Circuit did not err in invoking the futility doctrine, for, contrary to the government's assertions, futility is a well recognized principle for excusing a failure to object. See Ohio v. Roberts, 448 U.S. 56, 74 (1980) ("the law

---

5 The government's position in this brief is inconsistent with that taken in its brief opposing certiorari in United States v. Mang Sung Wong, 884 F.2d 1537 (2d Cir 1989), cert. denied, 110 S. Ct. 1140 (1990), pet. for reh. pending. In the instant case the government argues that certiorari should be granted because an objection was not necessarily futile; yet in Mang Sung Wong, it successfully argued against certiorari by distinguishing France on the ground that in France an objection would have been futile. Gov't. Br. in Mang Sung Wong, Appendix A, at page 6, n.2. Having gained success arguing the first position, the government should not now be heard to argue the second merely to gain another success. See Jett v. Zink, 474 F.2d 149, 155 (5th Cir. 1973) (having successfully taken one position before the court, a party may not take an inconsistent point to gain another success); Russell v. Rolfs, 893 F.2d 1033, 1037-1038 (9th Cir. 1990)(judicial estoppel prohibits the state from arguing one position in federal court and an inconsistent position in state court).

does not require the doing of a futile act"); Miranda v. Arizona, 384 U.S. 436, 495 n.69 (1966) ("failure to object at trial does not constitute a waiver of claim if no objection available"); Grosso v. United States, 390 U.S. 62, 70-71 (1968) (in view of law at the time of trial, counsel's failure to raise issue below is excused).

Indeed, the futility doctrine has long been applied by the circuit courts in a variety of procedural contexts to excuse counsel's failure to object or raise an issue below. See United States v. Byers, 740 F.2d 1104, 1109, n.6 (D.C. Cir. 1984) (Scalia, J.) (failure to object excused because counsel "could well have thought the objection futile" in view of existing law); Ingber v. Enzor, 841 F.2d 450, 454-55 (2d Cir. 1988) (defendant not required to pursue futile course); Guam v. Yang, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc) (failure to object to jury instruction not waiver where objection futile in view of circuit law); cf. Callanan v. United States, 881 F.2d 229, 231 (6th Cir. 1989)(fact that issue "appeared" to be settled constituted cause for not raising it).[6]

---

6 See also United States v. Indiviglio, 352 F.2d 276, 280, n.7 (2d Cir. 1965) ("appellate courts often notice error not objected to below when, under the law existing at the time of trial, objection would have been futile . . . "); United States v. Fay, 333 F.2d 12, 16 (2d Cir. 1969) (en banc) (failure to object to admission of evidence not waived where futile under existing law), aff'd, 381 U.S. 654 (1965); Smith v. Estelle, 602 F.2d 694, 708 n.19 (5th Cir. 1979), aff'd. 451 U.S. 454 (1981) (Sixth Amendment issue considered on appeal, although not raised at trial because of surprise and apparent futility in raising point); United States v. Liguori, 438 F.2d 663, 665 (2d Cir. 1971) (failure to raise issue of unconstitutionality of statutory presumption, where only one circuit had so held, was "futile"); O'Connor v. New Jersey, 405 F.2d 632, 634 n.2 (3d Cir.) ("considering the law at the time of [the defendant's] trial, it would have been a futile gesture" to have objected to the evidence), cert. denied, sub nom. O'Connor v. Yeager, 395 U.S. 923 (1969).

In the face of the foregoing authority, the government argues, alternatively, that the futility doctrine can be applied only where the trial court's action was "compelled" by controlling circuit authority. [Pet. at 11] This is clearly not the law, however, because the futility of an objection can arise from the reasonable perception of counsel as to the prevailing law or the prevailing practice of the court. As then Judge Scalia wrote for the majority while on the District of Columbia Circuit, "counsel could well have thought the objection futile" in view of the existing law. United States v. Byers, supra, 740 F.2d at 1104, n.6 (emphasis added); see Watt v. Page, 452 F.2d 1174, 1175 (10th Cir.), cert. denied, 405 U.S. 1070 (1972) (where trying prisoner in jail clothes was court's "common practice," failure to object was futile); United States v. Rivera, 513 F.2d 519, 526 (2d Cir. 1975) (no waiver where defendant "could have considered objection futile so far as district judge or this court was concerned"); United States v. Clark, 475 F.2d 240, 247, n.6 (2d Cir. 1973) (failure to object to defendant's absence did not waive sixth amendment violation, because an objection "may have appeared [to counsel] to be futile"); cf. Callanan v. United States, supra, (where issue "appeared" to be settled, counsel showed "cause" for not raising it).

Moreover, in the instant case, the government concedes that the "regular practice" in the district of Hawaii was to have magistrates conduct jury selection in "virtually all" cases. [Pet. at. 3,7] This regular practice of the District of Hawaii corroborates the Ninth Circuit's conclusion respecting futility. Yet more corroboration is found in United States v. Baron, 721 F. Supp. 259 (D. Haw. 1989), appeal pending, where the Hawaii District Court found that objection by present counsel to the magistrate's conducting jury selection would have been futile. In reaching its conclusion, the Court found that "this very same

defense counsel [Michael R. Levine] has objected to this practice [magistrates selecting the jury] in other cases and has appealed the denial of such objection without success." Id. at 262.

In view of the Ninth Circuit precedent, the District of Hawaii regular practice, and the futility of past efforts to object to magistrate selected juries, it would make little sense to require counsel to continuously "burden district courts with repeated assaults on this established principle." United States v. France, 886 F.2d at 228 [Pet. at 10a]; see Ingber v. Enzer, supra, 841 F.2d at 454 (no value in encouraging futile "appeal of even well settled points of law"); Callanan v. United States, supra, (same). This is especially true where such assaults could be deemed frivolous and result in substantial loss of credibility, not to mention serious sanctions. See In Re Becraft, supra at 6.

Notwithstanding the abundant authority to the contrary cited above, the government argues that futility can never excuse the failure to object. It relies on a statement in Engle v. Isaac, 456 U.S. 107, 128 (1982), that "the futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial." Reliance on this statement, out-of-context, is misplaced, because the government compares apples to oranges. It may be true, as set forth in Engle, that for a person in "state" custody who is raising a non-jurisdictional claim on habeas corpus, futility does not establish "cause" under the "cause and prejudice" test. This futility doctrine, however, arises in state habeas corpus cases because there is a legitimate concern of comity between state and federal systems. As stated in Engle v. Isaac:

> [T]he Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for

> vindicating constitutional rights. Federal intrusion into state criminal trials frustrate both the States' sovereign power to punish offenders . . . .

Id. at 128. Clearly the state-federal comity concerns of Engle have no application to the case at bar because the particular futility doctrine set forth in that case, unlike the doctrine relied on in France, was established so that a defendant in state custody "may not bypass the State Courts" Id. at 130 (emphasis added). Therefore, the Engle doctrine is simply inapplicable here.

In sum, the Ninth Circuit correctly held that in view of the circuit precedent as well as the uniform practice of the District of Hawaii, any objection by France to having a magistrate select her jury would have been futile.[7] This unremarkable holding, in reality, is nothing more than a reasonable application of the well settled doctrine of futility; consequently, certiorari is not justified.

---

7 The government cites one case in the Ninth Circuit in which, according to the government, a defendant's objection to magistrate-conducted voir dire persuaded a district judge to conduct jury selection himself: United States v. Rewald, Cr. 84-02417 (D. Haw. 1984). [Pet. at 12] That case, however, does not support the government because, although there was a defense objection, it was the government's objection that persuaded the district court to select the jury. Although that objection is obviously not part of the record in this case, present counsel, who was also trial counsel for Rewald, see United States v. Rewald, 889 F.2d 836, 859, notes 20 and 23 (9th Cir. 1989), certifies to this Court that such an objection was made. This can be easily verified by the Solicitor General by calling the Hawaii Assistant United States Attorney who made it, Mr. John Peyton at FTS 551-2580.

2. The impact of France on the criminal justice system is not as significant as the government suggests, and, in any event, is a result of the government's own policy.

The government also argues that certiorari should be granted because of the "large number" of cases that will be reversed in Hawaii "and elsewhere." [Pet. at 8] It points to the declaration of the Hawaii United States Attorney that, in Hawaii, 27 cases involving 48 defendants could be affected, assuming that each defendant seeks a new trial. [Pet. at 7-8, App. 13a] Furthermore, the government surmises that "there are many defendants from all over the country who did not object to magistrate's conducting voir dire and are thus in the same position as respondent." [Pet. at 7]

First, the government need not be concerned with the defendants from "all over the country" because it is only in the Ninth Circuit where a failure to object to a magistrate's selection of a jury has been excused by its futility.[8] Therefore, the government's fears that a great number of convictions outside the Ninth Circuit will be affected are unfounded. Moreover, even in the Ninth Circuit, the 48 federal convictions that could be affected by France, even assuming that each defendant seeks a new trial, represent only approximately one-tenth of one percent of the total number of convictions in the Ninth Circuit since 1984.[9] This does not suggest as great an

---

8 See United States v. Lopez-Pena, supra, 890 F.2d at 497 (objection not futile, unlike in Ninth Circuit); United States v. Wey, 895 F.2d 429 (7th Cir. 1990) (futility not raised); United States v. Mang Sun Wong, supra, (futility not raised); United States v. VanWort, 887 F.2d 375 (2d Cir. 1989) (futility not argued), pet. for cert. pending No. 89-6313; Government Of The Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989) (futility not raised), pet. for cert. filed, No. 89-6855, March 5, 1990; United States v. Musacchia, supra at slip op. pages 18-20 (unlike in Ninth Circuit, objection not futile).

9 There were approximately 6,300 criminal convictions that were appealed in the Ninth Circuit during the period from June 1987 to June 30, 1988. See, 1988 Annual Report of the Director of the Administrative Office of the United States Courts at page 144. Assuming, conservatively, that there were only 5,000

impact on the federal justice system as the government fears.

In any event, the government has no one but itself to blame for any new trials that may occur. In the case at bar, as in other cases, it chose not to object to the magistrate's selection of a jury. Had it done so, as it did in the Revald case, see n.7 supra, it is likely that the issue in the case at bar would not have arisen.[10] The government should not now be heard to complain to this Court about the consequences of its own policy.

3. Because the issue of "plain error" is not raised in the case at bar, certiorari is not warranted to decide that question.

The government urges this Court to grant certiorari to decide the additional question whether a magistrate's selection of the jury was "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure. [Pet. at 13,17] France agrees that, in the abstract, this is an interesting post-Gomez question that has spawned divergent views; however, the instant case simply does not raise it. Contrary to the government's inexplicable assertion in the last paragraph of page 13 of its petition, France never raised the issue on appeal, nor did the Ninth Circuit ever address much less decide it.

The government concedes, as it must, that France "does not expressly rest its judgment on [plain error grounds]." [Pet.

(cont'd)

convictions appealed during each of the years 1984, 1985, 1986, 1987, 1988, and 1989, the total number of convictions appealed was approximately 30,000. Forty-eight divided by 30,000 equals .16%.

10 See Government's petition for writ of mandamus filed in In Re United States (Carpenter) No. 90-3002 (2d Cir. Jan. 9, 1990). In that post-Gomez case, the defendant consented, but the government objected, to magistrate's voir dire, and it filed a writ of mandamus to the Second Circuit to order the district judge to conduct jury selection anew. After the writ was filed, the district court was persuaded to conduct the jury selection anew, and the petition for the writ was withdrawn; see also Government of Virgin Islands, supra, 892 F.2d at 306 (government did not object to jury selection by the magistrate).

at 13, n.11] Nevertheless, it argues, in effect, that the court in France implicitly rested its judgment on that ground. This is an inconsistent argument, however, because in its petition to the Ninth Circuit for rehearing en banc, the government argued that the court had "ignored" Rule 52(b) altogether. Appendix B at page 10. In view of the government's contradictory arguments, the court should view the government's latest position with skepticism. See also n.5 supra (government should not be heard to argue inconsistent positions).

In any event, the latest reasoning of the government is flawed because it assumes that "plain error" is the only means whereby the court in France could have reached an issue not raised in the district court. This assumption is plainly wrong because this Court has held that "the matter of what questions may be taken up and resolved for the first time on appeal is one left to the discretion of the court of appeal, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106, 120, (1976) (emphasis added); see Grosso v. United States, supra, 390 U.S. 62 at 70-71 (Court has discretion under 28 U.S.C. § 2106 to decide issue not raised below); In Re Howell, 731 F.2d 624, 627 (9th Cir. 1984) ("[R]ule of waiver is one of discretion rather than jurisdiction"), cert. denied, 419 U.S. 933 (1984). Indeed, the government's assumption is directly refuted in Grosso, supra. In that case, this Court, like the Ninth Circuit in France, exercised its discretion to review a legal issue not raised below precisely because of the apparent futility of raising it in light of the prevailing law. Significantly, this Court reached the issue even though the Court held that the failure to raise the issue below did not amount to "plain error." Grosso, supra, 390 U.S. at 70-71.

In short, regardless of the "plain error" doctrine, in the exercise of their discretion, appellate courts, as in France,

> often excuse a litigant's failure to object when at that time it would have been futile to do so, but a substantial change in or clarification of the law occurs in the litigant's favor after final judgment in the trial court.

United States v. Byers, 740 F.2d 1104, 1132 (D.C. Cir. 1984) (Robinson J., concurring); see id. at n.52 & n.53 (collecting cases); United States v. Whitten, 706 F.2d 1000, 1012 (9th Cir. 1983) (same), cert. denied, 456 U.S. 1100.[11]

With respect to the case at bar, this Court's unanimous decision in Gomez was decided while the case at bar was pending appeal. Gomez reversed two Ninth Circuit cases, one of which was litigated by present counsel, which had approved jury selection by a magistrate over a defendant's objection. Therefore, regardless of "plain error," in view of the "substantial change" in law brought about by Gomez, see Byers supra, there was nothing remarkable about the Ninth Circuit's having excused France's failure to raise the jury selection issue below. See France, 886 F.2d at 228 (France should not be penalized because she "did not guess that the law would change some time after the error was committed.")

In sum, the government's suggestion to the contrary notwithstanding, the case at bar does not raise the "plain error" issue. Hence, in effect, the government asks this Court to grant certiorari merely to render an advisory opinion, which this Court has long "refused" to do. Mistretta v. United States, 109 S. Ct.

---

11 In their discretion appellate courts will also decide an issue not raised below if it is "purely one of law and does not effect or rely on the factual record." Whitten, supra, 706 F.2d at 1012; United States v. Hayden, 860 F.2d 1483, 1485 (9th Cir. 1988) (although government did not raise issue below, because it is purely legal, court of appeals will decide it).

647, 661 (1989); see California v. Freeman, 109 S. Ct. 854, 856 (1989); Walters v. National Association of Radiology Services, 473 U.S. 305, 345-46 (1985). Accordingly, the Court should deny certiorari to the case at bar and grant it, instead, to a pending or future case that does raise the "plain error" issue.[12]

CONCLUSION

The government acknowledges that France creates no conflict among the circuits because it rests on the doctrine of futility. Nevertheless, it argues that certiorari should be granted to resolve the question of whether futility excuses lack of objection and whether "plain error" applies. These arguments are unpersuasive because the futility doctrine is a well recognized principle which excuses a failure to object. Hence, the issue does not raise an important question justifying certiorari. Moreover, even assuming, arguendo, that the doctrine was applied erroneously, this Court does not grant certiorari merely to perform an error correcting function. Finally, the issue of "plain error" is not even raised much less decided in France; consequently, the second argument for granting certiorari has no force.

In sum, therefore, certiorari should be denied.

DATED: Honolulu, Hawaii, April 2, 1990.

MICHAEL R. LEVINE
Attorney for Respondent
Darlina K. France

12 See E.g., United States v. Wey, 895 F.2d 429 (7th Cir. 1990) (plain error issue raised and decided); United States v. Musacchia, supra at slip op. page 23 (plain error issue raised and decided); United States v. Mang Sung Wong, supra 884 F.2d at 1544-45 (same).

APPENDIX A

No. 89-5949

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MANG SUN WONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-3317

QUESTION PRESENTED

Whether petitioner's convictions must be reversed because a magistrate presided over jury selection at his trial even though petitioner expressly consented to that procedure.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-5949

MANG SUN WONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-23A) is reported at 884 F.2d 1537.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1989. A petition for rehearing was denied on September 5, 1989. Pet. App. 19A-23A. The petition for a writ of certiorari was filed on November 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of

conspiracy to possess with intent to distribute more than one kilogram of heroin, in violation of 21 U.S.C. 846, and of attempted possession with intent to distribute more than one kilogram of heroin, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to ten years' imprisonment. The court of appeals affirmed, Pet. App. 1A-23A.

1. On May 18, 1987, petitioner and his counsel appeared before a magistrate for jury selection. Before petitioner and his codefendants arrived, the magistrate told petitioner's counsel that "a defendant is entitled to a trial before an Article 3 Judge." Pet. App. 26A. The magistrate then told counsel that "[i]t's been the practice in this Court to have Magistrates select the juries in many criminal cases," and that the court of appeals had approved the practice "in a case in which the [court of appeals] deemed it a waiver because no objection was made to the Magistrate for jury selection." Ibid. The magistrate then told counsel that he would give them the opportunity to discuss the issue with their clients because, the magistrate stated, he intended "to question them and take a waiver on the record." Pet. App. 26A-27A. The magistrate then directly asked counsel whether "[a]ny lawyer here now * * * would object to a Magistrate selecting a jury?" Petitioner's counsel replied "No." Pet. App. 27A.

After a recess, petitioner and his counsel appeared for jury selection. At that time, petitioner's two codefendants elected to plead guilty. The magistrate then dismissed the jury panel

from the courtroom and asked petitioner's counsel whether he had discussed with his client if he objected to the magistrate's conducting jury selection. Pet. App. 43A. When counsel replied that he had not, the magistrate instructed counsel to discuss the issue with his client. After consulting with his client, petitioner's counsel stated that petitioner understood the issue and waived his right to jury selection by a district judge. The magistrate then asked petitioner personally whether he had discussed the issue with his lawyer. Petitioner replied that he had. The magistrate asked petitioner if he was willing to have the magistrate conduct jury selection, and petitioner again assented. Pet. App. 43A-44A.

2. The court of appeals initially affirmed petitioner's conviction based on its decision in United States v. Garcia, 848 F.2d 1324 (2d Cir. 1988), in which it had held that a magistrate could delegate jury selection to a magistrate even absent the defendant's consent. The court added, however, that petitioner's "consent renders this claim meritless." Pet. App. 18A-19A.

After this Court reversed the Garcia decision in Gomez v. United States, 109 S. Ct. 2237 (1989), petitioner filed a petition for rehearing claiming that the decision in Gomez required reversal of his conviction. The court of appeals denied the petition. Pet. App. 19A-23A. It held that this Court had limited its holding in Gomez to cases in which the magistrate conducts jury selection over the defendant's objection.

Judge Altimari dissented. Pet. App. 22A-23A. He argued that "the consent of the defendant cannot enlarge those powers of office not granted by the Federal Magistrates Act." Id. at 23A.

ARGUMENT

Petitioner contends (Pet. 9-17) that, even though he expressly consented to the supervision of jury selection by the magistrate, he is entitled to reversal of his convictions under the Gomez decision. That contention is without merit.

1. In Gomez, the Court framed the issue before it as "whether [a magistrate's] presiding at the selection of a jury in a felony trial without the defendant's consent is among" the duties that the Magistrates Act empowers magistrates to perform. 109 S. Ct. at 2239 (emphasis added). The Court held that the statute does not authorize that procedure. The Court further ruled that the error could not be deemed harmless when "despite the defendant's objection, and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 109 S. Ct. at 2248 (emphasis added). Accordingly, as the court of appeals found, this Court explicitly limited the reach of its holding to situations in which the district court delegated jury selection to a magistrate over the defendant's objection. The Gomez decision does not require the reversal of a conviction where the defendant consented to the magistrate's conducting voir dire. 1/

1/ This Court often has held that a defendant may waive important constitutional rights. For example, the Court has held

(continued...)

Petitioner also argues (Pet. 14-17) that his consent was not knowing and voluntary, and that it was coerced by the presence of the jury panel in the courtroom. In fact, however, the magistrate directed petitioner's counsel to discuss the issue with petitioner after the panel had been dismissed. See Pet. App. 43A. After counsel had done so, he stated that petitioner understood the issue and consented to the magistrate's supervision of jury selection. Despite counsel's representation, the magistrate was careful to ask petitioner personally whether he had discussed the issue with his counsel and understood his right to be tried before a district judge. Under those circumstances, petitioner's consent was knowing and voluntary.

2. Petitioner contends (Pet. 9-10) that the supervision of jury selection by a magistrate is a "jurisdictional defect" in the sense that such an error may never be waived or cured by consent. That contention misapprehends this Court's use of the term "jurisdiction" in Gomez.

In Gomez, this Court held that the error under the Magistrates Act was not harmless because a defendant has a basic right "to have all critical stages of a criminal trial conducted

---

1/ (...continued)
that a defendant may waive the right to be free from compulsory self-incrimination, see Garner v. United States, 424 U.S. 648, 654 n.9 (1976), the right to counsel, see Adams v. United States ex rel. McCann, 317 U.S. 236, 275 (1942), and the right to a speedy trial. See Barker v. Wingo, 407 U.S. 514, 525-528 (1972). Indeed, a defendant can plead guilty and waive his right to trial at all. We know of no reason why the statutory right to have a district court preside at jury selection should be given special status that would preclude its waiver.

by a person with jurisdiction to preside." 109 S. Ct. at 2248. In context, the Court's use of the term "jurisdiction" appears to refer to the trial court's statutory authority -- i.e., that the district court had no authority under the Magistrates Act to refer jury selection to a magistrate. See also United States v. Rodgers, 466 U.S. 475, 479-480 (1984) (defining "jurisdiction" in 18 U.S.C. 1001 to mean "official, authorized functions"); cf. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 395 (1982) (holding that time limit for filing Title VII claims could be waived or tolled even though Court had earlier termed the requirement "jurisdictional"). It does not follow, therefore, that the district court lacked subject matter jurisdiction in this case to enter a judgment of conviction against petitioner. Nothing in Gomez even remotely suggests that the magistrate's supervision of jury selection divested the district court of the power to enter a binding judgment. As the Ninth Circuit noted in Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 543 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984), "the maxim that parties may not consent to the jurisdiction of federal courts * * * applies only where the parties attempt to confer upon an Article III court a subject matter that Congress or the Constitution forbid[s]." 2/

2/ Petitioner also claims that the decision of the court of appeals conflicts with the Ninth Circuit's decision in United States v. France, 886 F.2d 223 (1989). In France, however, the court held that a defendant did not waive a claim based on the Magistrates Act by failing to object to the magistrate's presiding at voir dire. The court held that such an objection
(continued...)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

JANUARY 1990

2/ (...continued)
would have been futile in light of settled Ninth Circuit precedent. By contrast, this case does not involve a mere failure to object; petitioner expressly consented to the magistrate's supervision of jury selection. Nor had the Second Circuit held that a defendant could not successfully object to a magistrate's conducting voir dire. At the time of petitioner's trial, the Second Circuit had held only that selection of a jury by a magistrate was not a plain error that required reversal in the absence of a contemporaneous objection. Indeed, the magistrate's solicitation of consent in this case is strong evidence that an objection would not have been fuitle. Thus, the decision in this case does not conflict with France.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-1282

UNITED STATES OF AMERICA,

Appellee

v.

DARLINA K. FRANCE,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

PETITION FOR REHEARING
WITH SUGGESTION OF REHEARING EN BANC

PRELIMINARY STATEMENT

On September 13, 1989, a panel of this Court (Nelson, Reinhardt, and Wiggins, JJ.) ruled that even in the absence of an objection, the delegation of jury selection to a magistrate is reversible error. Based on this decision, this Court already has reversed the felony convictions of five other defendants (see, infra, note 2), and 43 other convictions obtained in the District of Hawaii are in jeopardy. Moreover, the decision conflicts with United States v. Vanwort, Nos. 88-942-45 (2d Cir. Sept. 26, 1989). For these reasons, the need for en banc review of this decision is manifest. See Rule 35-1 of the Rules of this Court.

QUESTION PRESENTED

Whether a defendant who fails to object to the delegation of jury selection to a magistrate and thereafter informs the magistrate that she is satisfied with the manner in which jury selection is conducted waives the statutory right to have this portion of her trial conducted by an Article III judge.

STATEMENT

After a jury trial in the United States District Court for the District of Hawaii (Hon. Robert J. Kelleher), appellant Darlina K. France was convicted on one count of assault with a deadly weapon, in violation of 18 U.S.C. 113(a); assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(f); and using a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c). She was sentenced to five years' imprisonment and three years' probation.

1. The evidence at trial showed that appellant shot her husband on a federal military reservation during an argument. Prior to trial, in accordance with the regular practice in the District of Hawaii, the district court assigned jury selection to a federal magistrate. Appellant did not object to this assignment either to the magistrate or the district court; nor did she request that a district judge conduct the voir dire. During jury selection, the magistrate sustained both objections that defense counsel raised to the questions asked of the prospective jurors. At the conclusion of jury selection, the magistrate asked the parties, "For the record, would you like--is there any objection

you'd like to make in the manner in which the jury was selected?" Defense counsel replied, "No, your honor." When trial began the next day, appellant again failed to object to the magistrate's supervision of jury selection or to any of the magistrate's rulings during jury selection.

2. Appellant appealed her conviction to this Court. Her initial brief on appeal challenged only her conviction under 18 U.S.C. 924(c). Appellant raised no issue concerning the selection of the jury by the magistrate.

While the appeal was pending, the Supreme Court decided Gomez v. United States, 109 S.Ct. 2237 (1989). In Gomez, the Court held that the Federal Magistrates Act, 28 U.S.C. 631-638, does not authorize district courts to delegate jury selection to magistrates and that the selection of a jury by a magistrate is not harmless when the defendant makes a timely objection. In a motion filed in this Court after the Gomez decision, appellant claimed for the first time that the district court committed error in delegating jury selection to a magistrate.

A panel of this Court reversed appellant's convictions. The Court first held (slip op. 11403-04) that Gomez should be applied retroactively "at least" to all cases pending on direct appeal at the time it was decided.[1] The panel then held (slip op. 11405-07) that appellant had not waived her right to appellate review of this issue by her failure to object below. First, the panel

[1] The government does not take issue with the Court's retroactivity analysis.

rejected the government's argument that the Court in Gomez had limited its holding to defendants who had objected to the delegation of jury selection to the magistrate in the district court. Slip op. 11405-06.

In any event, the panel held, no objection was necessary because circuit precedent had authorized magistrates to conduct voir dire in felony trials. Thus, according to the panel, appellant faced a "solid wall of circuit authority" that would have prevented the district court from correcting the asserted error and rendered any objection futile. Slip op. 11406. The panel noted that the "solid wall of circuit authority" rule previously had been used only to excuse a defendant's failure to object to a jury instruction. It reasoned, however, that the rule announced in Gomez "touches on one of the most 'basic rights' of the accused, the right to a fair and accurate trial." Slip op. 11407. Therefore, the Court found, it would be "unseemly" to penalize a defendant for failing to object. Ibid.

REASONS FOR GRANTING THE PETITION

The panel's decision ignores the basic principle that a defendant who fails to object to an error during trial may obtain reversal based on that error only if it rises to the level of plain error. Moreover, in excusing appellant's failure to object without engaging in plain error analysis, the panel opinion misapplies the "solid wall of circuit authority" doctrine. This doctrine has no application where, as here, circuit precedent permitted but did not require the district court to pursue a

particular course of action. Finally, the decision conflicts with a recent decision of the Second Circuit. Thus, the panel's decision raises questions of exceptional importance. See Fed. R. App. P. 35(a).

The panel's decision also has enormous practical consequences. Prior to the decision in Gomez, it was the regular practice in the District of Hawaii to assign jury selection in criminal trials to magistrates. Magistrates have presided over jury selection for nearly every felony trial held in that district for several years. Thus, the panel's decision will require the reversal of dozens of convictions. Indeed, the United States Attorney for Hawaii estimates that approximately 48 defendants whose juries were selected by a magistrate now have appeals pending in this Court.[2] Affidavit of Daniel Bent ¶ 4 (attached).

The retrial of the defendants whose convictions are reversed will disrupt the district courts in Hawaii. The U.S Attorney estimates that these retrials will consume approximately 73 weeks of attorney time and a corresponding amount of court time in a district with only three district judges. Id. at ¶ 4. In addition, reprosecuting these cases will drain the resources of

[2] At the date this petition has been filed, this Court already has reversed the convictions of at least five other defendants based on the decision in France. See United States v. Kuamsiri, No. 88-1432 (two defendants); United States v. Taylor, No. 88-1442, United States v. Nittayanupap, Nos. 87-1395, 88-1001 (two defendants). The government intends to file petitions for rehearing asking this Court to stay its mandate in these cases pending the disposition of this petition. In United States v. Boran, No. 86-985-03 TJH (Oct. 2, 1989), the district court in Hawaii held that France requires the reversal of convictions on collateral attack.

the United States Attorney's office and of law enforcement agencies in that district.

In short, rehearing or rehearing en banc is necessary to resolve a conflict with another court of appeals and to correct the panel's unsupported decision to excuse appellant's failure to object to the delegation of jury selection to magistrates. Failure to grant rehearing will result in the near total disruption of the courts and the law enforcement apparatus in the District of Hawaii and will confer an unjustified windfall on defendants convicted of felonies in that district. Nothing in the Gomez decision compels such a result, and this Court should grant rehearing en banc to correct the panel's interpretation of Gomez.

1. The Gomez Decision.

In Gomez, the district court assigned a magistrate to conduct voir dire pursuant to a local rule that gave magistrates authority to discharge any duty set forth in Section 636 of the Magistrates Act. Gomez and his codefendants objected to the delegation to the magistrate. Gomez, 109 S. Ct. at 2239. At the beginning of trial, the defendants renewed their objection before the district judge. After the court of appeals affirmed, the Supreme Court granted review to decide whether the assignment of jury selection to a magistrate "without the defendant's consent" violated the Magistrates Act. Gomez, 109 S. Ct. at 2239.

The Court held that Congress had not intended jury selection to be among the "additional duties" that could be delegated to

magistrates. The Court also rejected the government's argument that delegation of jury selection to magistrates could be harmless error where the defendant made an objection in the district court. It held that the defendant's "'right to an impartial adjudicator, be it judge or jury,'" is a "basic fair trial right[]." According to the Court, "'[e]qually basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." Accordingly, the Court held that "harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 109 S. Ct. at 2248 (emphasis added).

2. The Panel's Decision Conflicts With A Decision By The Second Circuit.

In United States v. Vanwort, Nos. 88-942/943/944/945 (September 26, 1989), the Second Circuit held that a defendant's failure to object to the delegation of jury selection to a magistrate foreclosed him from obtaining reversal of his conviction on this ground. Slip op. 5877. The court relied on its earlier decision in United States v. Mang Sun Wong, No. 87-1278 (September 5, 1989), in which it held that a defendant's consent to supervision of jury selection by a magistrate precluded reversal of his conviction. In Mang Sun Wong, the Court explicitly found that "the Supreme Court limited its ruling to the situation in which a magistrate selects a jury "'despite the defendant's objection.'" Mang Sun Wong, slip op. at 7551;

see Vanwort, slip op. at 5877 (quoting Mang Sun Wong).

The decision in Vanwort directly conflicts with the panel's decision in this case. Moreover, the court's statement in Mang Sun Wong that the Supreme Court intended to limit its holding to cases in which a magistrate selected the jury over the defendant's objection directly conflicts with the panel's statement that the Court was merely "recapitulat[ing] the facts as a descriptive matter." Slip op. at 11406.

Consequently, this case satisfies the requirement of Rule 35-1 of the Rules of this Court that an appropriate ground for rehearing en banc exists if "the opinion of a panel directly conflicts with an existing opinion by another court of appeals." Because, moreover, of the practical consequences of the panel's decision, we submit that the decision "substantially affects a rule of national application in which there is an overriding need for national uniformity." For this reason alone, the petition for rehearing should be granted.

3. Appellant Waived Her Right To Have A District Court Preside At Jury Selection.

In this Court and in all other courts of appeals, it is a basic tenet of appellate procedure that the Court will not consider issues that a defendant failed to raise in the trial court. See United States v. Cloud, 872 F.2d 846, 853 n. 7 (9th Cir. 1989); United States v. Edwards, 800 F.2d 878, 884 (9th Cir. 1986). Appellant did not object to the delegation of jury selection to the magistrate; in fact, she expressed satisfaction with the manner in which it was conducted. She therefore cannot

raise the issue on appeal to this Court.

United States v. Gagnon, 470 U.S. 522 (1985), confirms this conclusion. In that case, several defendants failed to object when the district court held a conference in chambers without them, in violation of Fed. R. Crim. P. 43. This Court reversed the convictions in part because it found that the defendants had not expressly waived their Rule 43 rights. The Supreme Court summarily reversed, holding that the defendants failure to object to the conference constituted a waiver of their Rule 43 rights. 470 U.S. at 529. The Court reasoned that "[t]imely invocation" of the Rule 43 rights "could at least have apprised the District Court of the claim, and very likely enabled it to accommodate a meritorious claim." Ibid.

Like the defendants in Gagnon, appellant failed to assert a statutory trial right. Like the defendants in Gagnon, her silence should not be excused. If she had asserted the right by objecting to the delegation of jury selection to the magistrate, the district court may have conducted jury selection itself. Thus, under Gagnon, appellant waived any right to object to the delegation to the magistrate. See also Estelle v. Williams, 425 U.S. 501, 508 n.3, 512-13 (1976) (failure to object requirement that a defendant stand trial in prison garb constitutes waiver of due process violation).

4. The Panel's Decision Ignores Federal Rule of Criminal Procedure 52(b) And Settled Standards Of Appellate Review.

In the absence of an objection, only "plain" errors may be noticed on appeal. See Fed. R. Crim. P. 52(b). An error rises to the level of plain error only if it is "egregious" and will result in a miscarriage of justice if left uncorrected. See United States v. Frady, 456 U.S. 152, 163 (1982); United States v. Flores-Elias, 650 F.2d 1149, 1151 (9th Cir.), cert. denied, 454 U.S. 904 (1981).

No miscarriage of justice occurred in this case. Allowing magistrates to conduct voir dire and supervise jury selection does not undermine the integrity or reliability of a criminal trial. Indeed, in the District of Hawaii, magistrates presumably have acquired considerable expertise in selecting juries, suggesting that magistrate-selected juries are, if anything, more carefully chosen. Although the Court in Gomez held that the supervision of jury selection by a magistrate violates "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside," it did not find that magistrates were incapable of conducting jury selection or that a jury selected by a magistrate could not be trusted to return a fair and accurate verdict. To the contrary, the Court noted that congressional expansion of the role of magistrates through the years showed that "congressional concerns regarding magistrates' abilities had decreased." Gomez, 109 S. Ct. at

NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

CERTIFICATE OF SERVICE

I, RUTH G. FULLERTON, hereby certify that a true and exact copy of the foregoing document was duly mailed, postage prepaid to the following offices:

KENNETH W. STARR
Solicitor General
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

DATED: Honolulu, Hawaii, April 2, 1990.

RUTH G. FULLERTON
Legal Secretary to

MICHAEL R. LEVINE
Federal Public Defender
District of Hawaii

Attorney for Respondent
DARLINA K. FRANCE

Supreme Court, U.S.
FILED
APR 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1363

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases:	Page
United States v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988), rev'd *sub nom. Gomez* v. *United States*, 109 S. Ct. 2237 (1989)	2
United States v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989) (withdrawn), reh'g granted (Feb. 9, 1990)	3
United States v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990)	2
United States v. *Musacchia*, No. 88-1491 (2d Cir. Mar. 21, 1990)	2, 3
United States v. *Wey*, 895 F.2d 429 (7th Cir. 1990)	3
Rules:	
Fed. R. Crim. P.:	
Rule 51	1, 2
Rule 52(b)	3

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1363

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In our petition, we explained that the Ninth Circuit erred by not applying the plain terms of Federal Rule of Criminal Procedure 51. That rule provides that an error is preserved only if the party "makes known to the court the action which that party desires the court to take or that party's objection to the action of the court." Nothing in respondent's brief in opposition shows that the Ninth Circuit's decision is correct or too insignificant for this Court's review.

1. Respondent devotes much of her brief (Br. in Opp. 7-12) to her contention that there is an exception from Rule 51 for cases in which an objection would be clearly futile. But that claim, even if true, does not justify the court of appeals' judgment in this case. Respondent acknowledges (Br. in Opp. 12 n.7, 14) that the district courts in the Ninth Circuit were not required before *Gomez* to delegate jury

selection to a magistrate. Such a procedure was permitted, but not mandated. Thus, the litigants were free in the Ninth Circuit to request the district judge to conduct voir dire himself.[1] Hence, respondent should be bound by her decision not to "make[ ] known to the court" (Rule 51) that she would have preferred the district judge to conduct jury selection.[2]

2. Since we filed our petition in this case, the Second Circuit has taken a different approach from the Ninth Circuit on the "futility" question. The tension—if not outright conflict—between the approaches of the two circuits is an additional reason for this Court's review.

In *United States* v. *Musacchia*, No. 88-1491 (2d Cir. Mar. 21, 1990), the defendants did not object to a magistrate's conducting voir dire. Nevertheless, on appeal they argued that this Court's decision in *Gomez* required reversal of their convictions. They argued that they were not required to voice their view to the district court because any objection would have been futile in light of the Second Circuit's decision in *United States* v. *Garcia*, 848 F.2d 1324 (1988), rev'd *sub nom. Gomez* v. *United States*, 109 S. Ct. 2237 (1989). The Second Circuit rejected that argument and affirmed the convictions. The Second Circuit observed that the Ninth Circuit's *France* decision involved an "identical" "factual situation" (slip op. 6823), but the court found the Ninth Circuit's ruling unpersuasive. The Second Circuit noted: "[W]e

[1] In our petition, we described (Pet. 12) a case in Hawaii where the parties persuaded a district judge to conduct jury selection himself.

[2] Respondent mistakenly contends (Br. in Opp. 8 n.5) that our position in this case is inconsistent with our filing in *United States* v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990). In our brief in opposition in that case, we described the Ninth Circuit's holding in *France* to show that there was no conflict with *Mang Sun Wong*. We most certainly did not argue that the *France* decision was correct.

have not established an exception to the contemporaneous objection requirement in areas where there is a 'solid wall of authority' running contrary to the defendant's objection." *Ibid.* In any event, the Second Circuit held, at the time of the defendants' trial the Supreme Court had not spoken to the issue whether a district court could delegate jury selection to a magistrate. *Id.* at 6824. Thus, the court concluded, an objection was not "necessarily foredoomed." *Ibid.*

We believe that the Second Circuit correctly ruled that the exception for "futility," if any, must be extremely narrow. Thus, such an exception does not apply in a case such as this one where: (1) this Court had not ruled on the issue, and (2) the Ninth Circuit had permitted magistrates to conduct voir dire, but had not mandated that they do so.

3. In our petition, we stated (Pet. 13-16) that this case might give the Court the opportunity to decide whether the district court committed a "plain error" that may be reviewed under Rule 52(b) without a contemporaneous objection. In her brief in opposition, respondent apparently eschews any reliance on the plain-error rule. See Br. in Opp. 14-17. She then contends that this case is unimportant because it does not raise that issue, which has been addressed by several circuits.[3]

We disagree. In the first place, the "futility" issue is not limited to the Ninth Circuit, but will also affect a number of convictions in the Second Circuit. Moreover, the issues presented in this case are of great practical importance. Magistrates routinely conducted voir dire in many districts for years before this Court's decision in *Gomez*. Thus, there

[3] Every circuit to consider the issue has held that a district court's delegation of jury selection to a magistrate was not plain error. See *United States* v. *Musacchia*, *supra*; *United States* v. *Wey*, 895 F.2d 429 (7th Cir. 1990); *United States* v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989) (withdrawn), reh'g granted (Feb. 9, 1990).

are hundreds of convictions that were obtained in cases in which magistrates conducted voir dire. Those cases will be affected by a ruling as to the effect of a defendant's failure to object to the magistrate's role at the time of jury selection. It is undisputed, for example, that the Ninth Circuit's decision in this case may result in the reversal of the convictions of 48 defendants in Hawaii alone. Accordingly, the importance of the issue in this case to the administration of criminal justice calls for this Court's review.

Respondent's decision not to pursue a plain-error argument in this case leads us to modify our position with respect to two related cases in which the plain-error issue is squarely present. We had previously suggested that the Court need not grant certiorari in those cases, *DaSilva* v. *United States*, No. 89-1084, and *Chapoteau* v. *United States*, No. 89-6313,[4] because the plain-error issue was likely to be raised and resolved in this case. Because respondent has abandoned that issue, the Court may wish to grant the petitions in Nos. 89-1084 and 89-6313 in addition to granting the petition in this case.[5] By that action, the Court would be assured of addressing all of the important issues that have arisen in the wake of *Gomez*.

For the foregoing reasons and the reasons stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. The Court should also grant the petitions in *DaSilva* v. *United States*, No. 89-1084, and *Chapoteau* v. *United States*, No. 89-6313, and set the cases for briefing and argument in tandem.

KENNETH W. STARR
Solicitor General

APRIL 1990

---

[4] Those petitions arise from the same Second Circuit judgment. See 887 F.2d 375 (1989).

[5] We have sent a copy of this brief to counsel for petitioners in Nos. 89-1084 and 89-6313.

U.S. GOVERNMENT PRINTING OFFICE 1990—262 203:00855

(4)

No. 89-1363

Supreme Court, U.S.
FILED
JUN 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

MICHAEL R. LEVINE
Federal Public Defender
P.O. Box 50269
Honolulu, Hawaii 96850
(808) 541-2521
Counsel for Respondent

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 26, 1990
CERTIORARI GRANTED APRIL 23, 1990

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1363

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

INDEX

	Page
Relevant Docket Entries	II
Indictment	1
Transcript of Voir Dire of Apr. 27, 1987	3
Judgment and Probation/Commitment Order	56
Order allowing Certiorari	58

II

RELEVANT DOCKET ENTRIES

I. United States District Court for the District of Hawaii

1. December 22, 1986—Complaint filed
2. December 29, 1986—Detention Hearing
3. January 14, 1987— Indictment issued
4. April 21, 1987— Government's Proposed Voir Dire Questions
5. April 21, 1987— Defendant's Proposed Voir Dire Questions
6. April 27, 1987— Jury Selection
7. May 1, 1987— Verdict (Guilty as to Cts 2, 3 and lesser included on Ct. 1)
8. August 17, 1987— Sentencing
9. August 17, 1987— Judgment and Commitment
10. Sept. 8, 1987— Amended Notice of Appeal

III. United States Court of Appeals for the Ninth Circuit

1. November 10, 1988—Oral Argument
2. July 7, 1989— Case Submitted After Supplemental Briefing
3. September 13, 1989—Opinion reversing judgment filed
4. January 16, 1990— Order denying rehearing

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CR. No. 87-00079

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DARLINA K. FRANCE, DEFENDANT

INDICTMENT

[18 U.S.C. § 113(a), 113(f), 924(c)]

INDICTMENT

COUNT 1

The Grand Jury charges:

On or about December 20, 1986, at the Aliamanu military housing area, a place within the special maritime and territorial jurisdiction of the United States, in the District of Hawaii, DARLINA K. FRANCE, defendant herein, did assault Neal France with intent to commit murder;

All in violation of Title 18, United States Code, Section 113(a).

COUNT 2

The Grand Jury further charges:

On or about December 20, 1986, at the Aliamanu military housing area, a place within the special maritime

and territorial jurisdiction of the United States, in the District of Hawaii, DARLINA K. FRANCE, defendant herein, did assault Neal France with that assault resulting in serious bodily injury to Neal France;

All in violation of Title 18, United States Code, Section 113(f).

COUNT 3

The Grand Jury further charges:

On or about December 20, 1986, at the Aliamanu military housing area, a place within the special maritime and territorial jurisdiction of the United States, in the District of Hawaii, DARLINA K. FRANCE, defendant herein, did, during and in relation to the crimes of violence of assaulting and shooting Neal France, use and carry a firearm;

All in violation of Title 18, United States Code, Section 924(c).

DATED: January 14, 1987, at Honolulu, Hawaii.

A TRUE BILL

/s/ Betty Ann Keach
Foreperson, Grand Jury

/s/ [illegible]
United States Attorney

/s/ [illegible]
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Case No. Criminal 87-00079

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DARLINA K. FRANCE, DEFENDANT

Honolulu, Hawaii
Monday, April 27, 1987 – 10:00 a.m.

[Filed Mar. 28, 1988]

Jury Selection

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BERT S. TOKAIRIN
UNITED STATES MAGISTRATE

APPEARANCES:

For the Plaintiff: MARK BENNETT, Esq.
U.S. Attorney's Office
300 Ala Moana Blvd.
Honolulu, HI 96850

For the Defendant: BENJAMIN CASSIDAY, III, Esq.
333 Queen Street, Suite 610
Honolulu, HI 96813
526-9127

Court Recorder: JON T. OKIMOTO
U.S. District Court
P.O. Box 50129
300 Ala Moana Blvd
Honolulu, HI 96850
541-1300

Transcription Service: V/ARS, INC.
1300 T Street
Sacramento, CA 95814
(916) 448-2457

Proceedings recorded by electronic sound recording. Transcript produced by transcription service.

DISTRICT COURT OF HAWAII,
MONDAY, APRIL 27, 1987, 10:00 A.M.

[1] **PROCEEDINGS**

(Jury in at 10:00 a.m.)

(Call to Order of the Court)

THE CLERK: Please be seated. Criminal 87-00079, United States of America versus Darlina France. Case is called for jury selection.

MR. BENNETT: Good morning, Your Honor. Mark Bennett, the United States, and with me at counsel table is John Blake, Special Agent for the FBI here in Honolulu.

MR. CASSIDAY: Good morning, Your Honor. Ben Cassiday representing Karen France who's present in Court. Your Honor, she goes by the name of Karen rather than Darlina, which is her middle name.

THE CLERK: All right.

MR. CASSIDAY: Thank you.

THE COURT: She goes by what name?

MR. CASSIDAY: Karen.

THE COURT: This is the United State District Court for the District of Hawaii. This Court has adopted electronic sound recording as the official record of proceedings. All persons are requested to speak into a microphone. The audio operator will remind anyone who is not being recorded properly to speak more clearly or closer to the microphone. Attorneys are likewise reminded to [2] identify themselves and whom they represent whenever addressing the Court. Will the attorneys, all the attorneys, approach the bench?

(Bench conference on the record)

THE COURT: This is just a preliminary conference. We'll pick the criminal case first. Next is the attorneys for the civil case. The criminal case we'll pick 30—or try 32. We'll pick 12 jurors, two alternates. Peremptory challenges will be 7-11. Seven for the Government, 11 for the defendant. For the civil case, we'll pick 16—16, we'll pick six and two alternates. Peremptory will be 4-4. You pick, then you pick. You've been through this before? (Indiscernible.)

MR. BENNETT: In the—

THE COURT: I'll be calling you back—

MR. BENNETT: —in the criminal you have both sides strike at the same time.

THE COURT: You'll be going—you submit your seven. He submits his eleven.

MR. CASSIDAY: We're not going to ask back around?

THE COURT: No.

(Indiscernible.)

MR. BENNETT: Magistrate Conklin does it the other way. I can never remember.

THE COURT: Oh, I'm sorry.

[3] (End of bench conference)

THE COURT: Good morning, ladies and gentlemen of the prospective jury panel. I am the United States Magis-

trate, Bert S. Tokairin and I will be assisting the parties involved in two separate trials to qualify and select two separate jury panels to hear these cases. One jury panel will hear and decide a criminal case. The second jury panel will hear and decide a civil case. Panel one, which will hear a criminal case, which the case will commence on Tuesday, that's tomorrow, April 28 at 9:00 a.m. The trial judge will be the Honorable Alan A. McDonald. He is a visiting District Judge from the Eastern District of Washington, of Spokane. He's coming in from Spokane.

Panel two will hear a criminal case. Will commence also tomorrow, Tuesday, April 28 at 9:00 a.m. The trial judge for the civil case will be the Honorable Robert J. Kelleher, visiting Senior Judge from California, so you have two visiting judges.

Now, if you are not selected for the first jury panel you may be selected to serve in the second jury panel, and for this reason the Court and the parties request that you give your full attention to the proceedings.

Last week, Thursday and Friday, the Court received, reviewed, and acted upon written requests for excuses submitted by you prospective jurors, so those who [4] desire to have their excuses considered have done so through written requests. Since there may be last minute change in circumstances for some of you here the Court nonetheless will receive and consider any additional request for excuses. Please do not request excuses based on employment hardships because it will not be sympathetically heard. Frankly, all of you are working people. All of you are sacrificing. All of you are making sacrifices to perform your civil duty as U.S. citizens, so I will not consider employment excuses.

Now, before we begin the jury selection process I like to thank every one of you for being present here this morning in response to the government's call to perform a very vital

and indispensible role as U.S. citizen. Our Court will not function if you do not serve as our jurors. Good example is this morning, we have a criminal case and a civil case, and without your cooperation and assistance we, the judicial system, will not function. Efficient jurors are men and women of sound judgment, absolute honesty, and complete sense of fairness. Jury service is a high duty of citizenship. This morning you are being asked by the parties to judge them and the system is based on the proposition that the law flows from the people. Now, for those of you who have previously served as a juror I ask your impatience and indulgence as the Court reviews the jury [5] selection process this morning.

Now, you prospective jurors sitting in Court this morning truly represent a cross section of the American public and this community with a corresponding cross section of personal, educational, cultural, and employment backgrounds you're bringing to this courtroom. Different experiences, beliefs, prejudices, if any, that I hope balance each other out. The bottom line is for each of you to recognize any bias or prejudice you may have and to conscientiously not permit it in any way to influence your finding in deciding these cases. We all know that we cannot instaneously erase any bias or prejudice we may have just because we walk through the front door of this courtroom. It's impossible, so the thing is to remember your bias, or any prejudice you may have and see if you can suppress it.

The jury system only ask of its jurors to render a fair and impartial verdict. Fair and impartial to both sides, and this is based on the testimony and evidence received by you during the trial and the instructions on the law as it applies to this case as given to you by the trial judge at the end of the trial.

The Court's responsibility is to conduct the trial of the case in an orderly, fair, and efficient manner, to rule upon questions of law arising in the course of the trial, and to instruct you as to the law which applies to [6] this case. It is your duty to accept the law as the Court states it to you, notwithstanding what you may feel the law is or the law should be. The function of the jury is to determine the facts. You are the sole and exclusive judges of the facts and you alone determine the weight, the effect, and the value of the evidence as well as the credibility of the witnesses. That is who to believe. You must consider and weigh the testimony of all witnesses who have appeared before you and you alone are to determine whether to believe any witness and extent to which any witness should be believed. It is your responsibility to resolve any conflicts in testimony which may arise during the course of trial and to determine where the truth lies. You may, as jurors, accept or reject the testimony of any witness in whole or in part. There is absolutely no rule of law that says one person is more believable than the next, and whether a person is believable or not believable, you will be the ultimate judge based on some of the guidelines that's given to you and the instructions on the same subject that will be given to you by the trial Court.

There may be times during the jury selection process that the attorneys will approach the bench to discuss a matter out of your hearing like we just did this morning. The bench conferences involves questions of law relating to the Court's functions therefore bench conferences [7] do not involve anything necessitating your participation or action, and the law requires that the matter be discussed at the bench, either bench or side bar conferences. Therefore you are to draw no inference for or against the party who seeks or does not seek the bench conference.

I will assume that having diligently raised your hands up for jurors you are at this point of time somewhat familiar with the jury selection process. For our first jury panel, which is a criminal case, the Court – the clerk will randomly pick and draw out 32 names from which 12 jurors and two alternate jurors will be qualified. Each of the 32 prospective jurors shall be assigned a juror number. It is very important that you remember your assigned jury number because hereafter you will be identified by your juror number. Identifying our jurors number will greatly assist the Court, the attorneys, and the court clerk in monitoring and identifying the many faces and many names. After the 32 names are drawn by the clerk the jurors will be challenged for cause. Well, challenge for cause sounds intimidating, but all that means is that you will be asked to be excused for a specific reason. The reason will vary from prospective juror to prospective juror. The fact that you may be so excused from hearing this case has absolutely no reflection upon your integrity or character since you may be perfectly qualified and – and acceptable to hear and [8] decide another case, be it a civil case or a criminal case. It may just so happen that you may not be qualified to hear a particular case for reasons beyond your control. For those of you who may be excused for cause you will be replaced by others in a jury panel this morning. For this reason I previously told you, please pay attention because you may be called to replace another juror.

After we have completed excusing jurors for cause the Court will then exercise preemptory challenges to excuse additional jurors from serving as jurors in this case, and I – again, I mention this case only.

Lastly, it's always a good idea for the Court to select alternate jurors to sit and hear the case just in case we lose a regular juror for any reason, like you and I carry a spare tire in case of emergency. However, if – at the end of the

trial we still have the original jurors then the alternate jurors will be excused and they will not participate in the jury deliberations.

A few cautionary instructions that you follow will greatly assist the Court in expediting the selection this morning. If during a jury selection a recess is called please return to the courtroom on time, so I suggest that you not roam beyond the fourth floor. We've had cases where some people have gone over to the cafeteria for coffee and delayed jury selection for a long time. I suggest that you [9] synchronize your watch with the courtroom clock—wall clock, and during the trial I'm sure the trial judges also follow the wall clock. The wall clock may not be absolutely correct, but at least we'll all be on the wrong time.

Now, don't feel that you're a captive here, you're prisoner now. If you feel that you like to leave the courtroom just raise your hand, come up here, I'll listen to you privately. I don't want you to feel that you're stuck in here you can't move. Anytime you feel like—you like to address the Court raise your hand.

Lastly, in answering—or asking a question please follow the following rules, first stand up, give you juror number, and then your last name. This way this will alert all the attorneys and the clerk as to who is speaking. For instance, stand up and say, "Juror 33, Kealohanui", or "Juror 13, Chang", and this will alert the parties.

All right, at this time I will ask the clerk to randomly draw 32 prospective juror names from the wheel. Now, these prospective jurors when called originally will fill up this jury box, and those of you, after it's filled up will occupy those seats on the right side of the courtroom so as it starts filling up you can move over this way. All right? Any visitors here I will ask to sit on the left series of chairs there. These—these—all right.

THE CLERK: Juror Number 23, two three, George Maehara.

(Plause)

THE CLERK: Juror Number 35, three five, Catalina Portillo.

(Pause)

THE CLERK: Juror Number 1, William Akana.

(Pause)

THE CLERK: Juror Number 38, three eight, Yolanda Rivera.

(Pause)

THE CLERK: Juror Number 16, one six, On Sun Kim.

(Pause)

THE CLERK: Juror Number 44, four four, Jack Yama.

(Pause)

THE CLERK: Juror Number 37, three seven, Linda Rivera.

(Pause)

THE CLERK: Juror Number 9, Margaret Donegan.

(Pause)

THE CLERK: Juror Number 5, Harriott Burrell.

(Pause)

THE CLERK: Juror Number 55, five five, Harold Suetani.

(Pause)

THE CLERK: Juror Number 17, one seven, Harry Kon.

[11] (Pause)

THE CLERK: Juror Number 52, five two, Walter Higa.

(Pause)

THE CLERK: Juror Number 24, two four, Michael Makua.

(Pause)

THE CLERK: Juror Number 54, five four, Manuel Perreira.

(Pause)

THE CLERK: Juror Number 42, four two, Theresa Warner.

(Pause)

THE CLERK: Juror Number 51, five one, Cathy Kim.

(Pause)

THE CLERK: Juror Number 3, Lisa Bernhardt.

(Pause)

THE CLERK: Juror Number 50, Sally Kido.

(Pause)

THE CLERK: Juror Number 47, four seven, Thelma Aana.

(Pause)

THE CLERK: Juror Number 32, three two, George Nip.

(Pause)

[12] THE CLERK: Juror Number 43, four three, David Wilson.

(Pause)

THE CLERK: Juror Number 4, William Biga.

(Pause)

THE CLERK: Juror Number 53, five three, James Kanemaru.

(Pause)

THE CLERK: Juror Number 15, one four, Ray Ishihara.

(Pause)

THE CLERK: Juror Number 20, two zero, Norman Lee.

(Pause)

THE CLERK: Juror Number 36, three six, Felicitas Remigio.

(Pause)

THE CLERK: Juror Number 22, two two, Jason Lum.

(Pause)

THE CLERK: Juror Number 13, one three, Jon Inafuku.

(Pause)

THE CLERK: Juror Number 8, Justina Desuacido.

(Pause)

THE CLERK: Juror Number 59, five nine, David Wong.

[13] (Pause)

THE CLERK: Juror Number 18, one eight, Garret Kuehu.

(Pause)

THE CLERK: Juror Number 41, four one, Joseph Tato. That's 32, Your Honor.

THE COURT: All right, thank you.

(Pause)

THE COURT: As mentioned earlier, the first jury panel will hear a criminal case. Has anyone here previously served as a juror either in a criminal or a civil case? Raise your hand and I'll get to you. Start with the jury box first off. Give me your juror number, your last name, and tell me whether it was a criminal case, civil case, whether it was a state or federal case, and then approximately what year you served as a juror. Now, I don't expect you to—use your best—best guesstimate. All right, your number?

JUROR 55: Fifty-five.

THE COURT: Fifty-five? Your last name?

JUROR 55: Suetani. Suetani.

THE COURT: Suetani. And you served civil or criminal case?

JUROR 55: Civil.

THE COURT: Civil case. State or federal?

[14] JUROR 55: State.

THE COURT: And was this criminal or—I'm sorry, was this—what year was this?

JUROR 55: I don't know. Under Judge Fukushima.

THE COURT: On, that's a long time ago. At least 10 years ago. All right, now, have you served in a criminal case?

JUROR 55: No.

THE COURT: No. All right, first row, anyone else? Second row? All right, your number and name?

JUROR 37: Thirty-seven, Rivera.

THE COURT: And this was a civil or criminal case?

JUROR 37: It was a criminal—

THE COURT: Criminal.

JUROR 37: —First Circuit Court and—

THE COURT: State case? What year? What year?

JUROR 37: Oh, gosh, its—

THE COURT: How many years ago?

JUROR 37: In the 70's—the latter 70's or—

THE COURT: In the 70's. All right, thank you. Anyone else in the jury box? All right, let's go down the first row there. I see a hand.

JUROR 3: Number 3, Lisa—

THE COURT: Number 32? Your last name?

JUROR 3: Bernhardt.

[15] THE COURT: Yes, Bernardt. Was this a civil or a crimimal case?

JUROR 3: Criminal.

THE COURT: And state or federal?

JUROR 3: State.

THE COURT: Approximately what year?

JUROR 3: '85.

THE COURT: '85. All right, thank you. First row? Yes.

JUROR 47: State Court.

THE COURT: No, your number and name.

JUROR 47: Forty-seven. Was a—

THE COURT: Your name?

JUROR 47: —civil case. Thelma Aana.

THE COURT: Aana, and it's criminal or civil case?

JUROR 47: Civil case.

THE COURT: And this is state or federal?

JUROR 47: State.

THE COURT: State.

JUROR 47: About three years ago.

THE COURT: Two years ago.

JUROR 47: Two to three years ago.

THE COURT: All right, thank you. Second row. All right, your number and name.

JUROR 20: Number 20, Lee.

[16] THE COURT: Eight?

JUROR 20: Twenty.

THE COURT: Twenty. Your last name?

JUROR 20: Lee.

THE COURT: All right, is this a civil or criminal case?

JUROR 20: Both.

THE COURT: All right. Is it federal or civil? I'm sorry, is it—

JUROR 20: State.

THE COURT: —federal or state?

JUROR 20: State.

THE COURT: State would be which one? The criminal?

JUROR 20. Both.

THE COURT: Both were in State Court.

JUROR 20: Yes.

THE COURT: All right, and the—when was the civil case?

JUROR 20: About two or three years ago.

THE COURT: And your criminal case?

JUROR 20: Same time.

THE COURT: Two to three years. All right, third row. All right, number and name?

JUROR 8: Eight, Desuacido.

[17] THE COURT: This was a civil or criminal case?

JUROR 8: It was a civil case.

THE COURT: State or federal?

JUROR 8: State.

THE COURT: What year?

JUROR 8: 1978.

THE COURT: All right, thank you. Anyone else in that section there? Let's go to the center section first row. Second row. All right, you number—oh, first row.

JUROR 57: Excuse me, 57, Vrana.

THE COURT: And this is civil or criminal case?

JUROR 57: It's a criminal case.

THE COURT: And state or federal?

JUROR 57: State.

THE COURT: What year?

JUROR 57: About 1982.

THE COURT: 1982. Thank you. Second row.

JUROR 27: Twenty-seven, Marouchoc.

THE COURT: State—is this civil or criminal case?

JUROR 27: Criminal.

THE COURT: And state or federal?

JUROR 27: State.

THE COURT: What year?

JUROR 27: One in either '83 and '84 and then one [18] in '84 and '85.

THE COURT: All right, thank you. Third row. Fourth row. Anyone else in the center section? All right, did I miss anyone? All right, thank you. As indicated, we have people that served in a civil case as well as a criminal case, or some who only served in one case, either civil or criminal. Let me explain the difference in the standard of proof as required in a criminal case as compared to a civil

case so that you will not confuse the different standard of proof required in each case. Now, the trial judge will explain this to you in detail but I like to put you on notice at this early stage. In a civil case or a suit like say, typical is auto accident, you feel that the other party struck you at the intersection, you feel that he is wrong, he should pay for you damages. In order to win and collect damages for your automobile the plaintiff, that's you who's suing, must prove your case by a preponderance of the evidence. I'm sure you've heard the word preponderance of the evidence. Preponderance of the evidence in a civil case means anything over 50 percent in your favor will win. This is if the jury finds the evidence favoring the plaintiff is anything over 50 percent the plaintiff will win. That is plaintiff's evidence is better than the defendant's over 50 percent.

However, in a criminal case, such as this, the [19] government must prove the guilt of the defendant beyond a reasonable doubt. So you've heard also the word beyond a reasonable doubt, so you have a difference of preponderance of the evidence in a civil suit, and beyond a reasonable doubt in a criminal case.

I like to illustrate the difference by use of this ballpoint pen. If the ballpoint pen is the scales of justice, in a civil case preponderance of the evidence, anything more than 50 percent the plaintiff will win and collect money damages, so anything slightly tipping the scale in the plaintiff's favor will win. In a criminal case the burden is on the government to prove its case beyond a reasonable doubt. This scale must dip considerably. There's a big difference in the standard. Again, the trial Court will explain to you in detail the standard you are to apply in the case that you are hearing.

Has any prospective juror served previously as a juror either in—has served in a grand jury—grand jury either in

a state or federal court? All right, the record will note no response.

(Pause)

THE COURT: This trial is estimated to take approximately five days. Do any of you have previously engaged yourself to be elsewhere on business or a planned vacation thus preventing you from attending this case within [20] the time limit of five days? Now, this is—you must show that you have a planned vacation, you have a plane ticket and you have a hotel reservation. All right? I don't want you to suddenly decide you're gonna take a trip. All right, you have one?

JUROR 17: Yes, sir.

THE COURT: Anyone else? All right, would you come up on this side bar and I'll talk to you?

(At the side bar on the record)

THE COURT: Mr. Chanin, would you like to—

JUROR 17: Seventeen, sir. Kon. Kon, K-o-n.

THE COURT: Okay, fine. This is Juror 17, Mr. Kon. What's your problem?

JUROR 17: Yeah, my wife—I just got married in February. She's having complications with birth right now.

THE COURT: No, again, you weren't listening. I said taking vacations.

JUROR 17: Well,—

THE COURT: A vacation.

JUROR 17: —yeah, she lives at Vancouver, B.C.

THE COURT: But what—when—

JUROR 17: Well, I work for the airline. I was supposed to leave yesterday, so—I was told to come here 'cause of the jury duty selection, so—

[21] THE COURT: Didn't you submit that with your request?

JUROR 17: I just found out Saturday by phone call, so I won't be able to get out till Saturday, actually. This—because I don't have any flights out till Saturday. I'm an employee for the airlines.

THE COURT: So you can sit until this weekend?

JUROR 17: Up to Saturday. I'm not sure, you know, how long the jury's—

THE COURT: Well,—

JUROR 17: —gonna go on.

THE COURT: —we—we cannot guarantee you it will stop exactly on Friday.

JUROR 17: Yeah, so I—I just wanted to let you know, you know, my—

THE COURT: I think the judge is taking Friday off.

MR. BENNETT: That was—that was Judge Kelleher I thought.

THE COURT: I think Kelleher's probably—

JUROR 17: She's a resident of Vancouver, B.C.

THE COURT: What's her problem?

JUROR 17: She's pregnant.

THE COURT: Well, how many months?

JUROR 17: She's only five.

THE COURT: But there's—there's no complications yet.

JUROR 17: Well, what—phone call I had Saturday is—well, she said, "Something's wrong with the baby. It's turning an opposite way right now." (Indiscernible.)

THE COURT: Yeah, I—

JUROR 17: I'm not sure as to the reversing (indiscernible).

THE COURT: I'm gonna put a question mark by it. Okay, bring in the next victim. (Indiscernible.)

THE COURT: Sir, I have no letter here and now what's your number?

JUROR 44: Forty-four.

THE COURT: Forty-four?
JUROR 44: Yeah.
THE COURT: What's your name?
JUROR 44: Yama.
(Remainder of discussion at side bar with Juror 44 indiscernible)
(End of discussion at side bar)
THE COURT: Mr. Kon, you've got May 8, right?
JUROR 17: Pardon?
THE COURT: May 8 is your date? Look at the letter.
JUROR 17: Oh.
THE COURT: No, I'm sorry, not Mr. Kon, but Mr. Yama.
JUROR 44: Is that an eight?
THE COURT: Eight. All right. You're all right. You can serve. Anyone here not feeling well this morning, feeling ill? All right, record will note no response. Anyone here who has a physical impairment? For instance if you're hard of hearing, medically you're hard of hearing or [24] you have severe lower back problems that you cannot sit for any length of time, maybe one hour.
JUROR 16: Your Honor, I have—
THE COURT: All right, one minute now. Anyone else? All right, will you come up to side bar?
(At side bar on the record)
JUROR 16: Juror 16.
THE COURT: Juror—Juror 16?
JUROR 16: Kim.
THE COURT: Kim?
JUROR 16: K-i-m.
THE COURT: And what's your medical problem?
JUROR 16: My medical problem is that I had surgery on my spine and they removed two of my disks.
THE COURT: When was this?

JUROR 16: In 1982. I cannot—my (indiscernible). I cannot for long sit. I have to stand up and like that, but the pressure.
THE COURT: How about one hour?
JUROR 16: Well, about 45 minutes or something when I feel the pain, and I don't want to take medication if I'm going to serve on the jury, it might distort my mind.
THE COURT: You have to feel the kinds of pain?
JUROR 16: After 45 minutes I have to stand up. If you don't mind me standing up?
THE COURT: No, well, we want you to pay attention [25] we don't want you to be worrying about your back problem.
JUROR 6: Plus, I'm—I'm just recovering from a heart attack that happened in February.
THE COURT: Who's your orthopedic surgeon?
JUROR 16: Eugene Banks (phonetic).
THE COURT: And you're still under this care?
JUROR 16: Yeah, I see him only once a year now.
THE COURT: Well, are you on medication?
JUROR 16: Yes, I'm taking motrin, 600.
THE COURT: That's for your back?
JUROR 16: For my back.
THE COURT: Are you retired?
JUROR 16: I'm retired.
THE COURT: Gentlemen, any objection to his—
MR. CHANIN: No objection.
MR. BENNETT: No objection.
THE COURT: You're excused. All right, next?
JUROR 53: Fifty-three.
THE COURT: Your last name?
JUROR 53: Kanemaru.
THE COURT: Kanemaru.
JUROR 53: —maru.
THE COURT: And what's your problem?

JUROR 53: I'm hard of hearing.

THE COURT: Do you use hearing aids?

[26] JUROR 53: Never did.

THE COURT: Could you hear me this morning?

JUROR 53: No. I hardly make out what you're saying.

THE COURT: You're sitting back there?

JUROR 53: Yes, sir.

THE COURT: If you sit here if you sit up here, do you think you can hear?

JUROR 53: I've been working for 44 years and I'm still a welder. Machine is beside me right there, you know,—

THE COURT: Well,—

JUROR 53: —all day long.

THE COURT: —any reason why you don't near me?

JUROR 53: Because I feel that I don't—I don't miss anything. Like listening to you people talk. My vocabulary's very low too. I hardly understand—lot of words I don't understand. You gotta sort of, you know, make me understand, you know? Lot of big words I don't understand, so I think I—I don't need problems like that.

THE COURT: Well, Mr. Kanemaru,—

JUROR 53: I'm only with construction workers,—

THE COURT: Mr. Kanemaru,—

JUROR 53: —and we only make small talk.

THE COURT: —can you near me, what I'm saying?

JUROR 53: Yeah, right here, yeah.

[27] THE COURT: Most of the time they're gonna use a microphone.

JUROR 53: Yeah.

THE COURT: And you'll be sitting in the box.

JUROR 53: I hear vibration only most time. You know. It's been a long time.

THE COURT: Gentlemen?

MR. BENNETT: I have no objection to excusing the juror.

MR. CHANIN: No objection.

THE COURT: All right, you can go now, Mr. Kanemaru.

JUROR 53: Can I?

THE COURT: Yes.

JUROR 53: Thank you.

THE COURT: All right, next?

MR. CASSIDAY: Actually, Your Honor, the purpose of the jurors is to hear the evidence.

JUROR 55: I just wanted to use the bathroom, Your Honor.

THE COURT: We—we—you could listen to my question. I'll—I'll call a recess, sir. Okay, I'll just let you take one. You can go. Come right back and I'll—I'll send the marshal after you.

(End of discussion at side bar)

[28] THE COURT: Anyone here feel that because of their limitation in understanding, reading, or speaking the English language he or she will not be able to intelligently follow the trial proceedings? All right, record'll note no response. Anyone feel they have a most serious and pressing personal problem right now that he or she is involved in and therefore will not be able to devote his or her full attention to the cases? It has to be a very serious—not worrying about your work now. I'm not gonna listen to any work-related excuses. I mean personal problem where there's illness in the family. I—I still see a raising a hand. All right, would you come up here?

(At side bar on the record)

THE COURT: What is your juror number?

JUROR 36: Number 36.

THE COURT: Thirty-six, and your last name?

JUROR 36; Remigio.

THE COURT: Remigio.

JUROR 36: Remigio.

THE COURT: And what is your problem?

JUROR 36: My husband was totally disabled and he's confined in a nursing home, and I have three kids to take care, and I have to be always in a place that they can call me at anytime.

THE COURT: Well, you have no one else?

[29] JUROR 36: I have my sister but she's busy now. She's always busy—always go out.

THE COURT: Well, how often do you visit your husband, ma'am?

JUROR 36: Three times a week.

THE COURT: Three times a week. How many children have you got?

JUROR 36: I have three.

THE COURT: Huh?

JUROR 36: Three.

THE COURT: Okay, and how old are they?

JUROR 36: Fifteen, 14 and 12.

THE COURT: Fifteen, 14 and 12. Well, they all go to school.

JUROR 36: Yes, sometimes they—

THE COURT: Well, can you see your husband after—after—after five o'clock?

JUROR 36: Yes, I can go but sometimes there's a time that he's in serious condition and they have to contact me or—

THE COURT: What's wrong with him?

JUROR 36: I don't—

THE COURT: What's wrong with your husband?

JUROR 36: He got—he had a stroke.

THE COURT: A stroke?

[30] JUROR 36: Yes.

THE COURT: And is he conscious? He can talk?

JUROR 36: No.

THE COURT: He can see?

JUROR 36: He often—well, he's—you know, he's—he doesn't know what's going on around him.

THE COURT: Okay, I'm gonna put a question mark on your name. All right, thank you.

JUROR 36: Thank you.

(End of discussion at side bar)

THE COURT: Anyone else? All right, record'll note no further responses.

(Pause)

THE COURT: The Court having excused those the Court considered cases of extreme hardships, physical disabilities, Court will now commence with the voir dire process. Voir dire or voir dire is a French word meaning to speak the truth. The parties, the—in this case the government and the defendant, demand and do expect that you be candid in your answers to questions put to you in order that they be able to select a panel of jurors that will be fair and impartial and not be swayed or influenced even the slightest by bias, or prejudice, or favor as to any side. As stated early—earlier, you do represent a cross section of the United States and our community with a cross—[31] corresponding cross section of any bias or prejudice, if any, and life experiences that cannot be erased, ignored, disregarded just because you walk into this courtroom. We've got to be—we've got to face this. Therefore, through the process of voir dire we hope to find a panel that will be fair and impartial to both sides in this case. The thing to remember again is that you should recognize your own bias or prejudice, if any, and conscientiously keep it in check and not permit it to influence you in judging the case. And if you feel you cannot do so by all means inform the Court and let the Court decide whether, under the circumstances, you should be excused.

The parties to this case and the Court will appreciate your candid answer to questions that will be asked of you during this procedure.

The jury panel qualified and selected will hear a criminal case and the defendant is Darlina Karen France. The defendant is charged under a three count indictment. The indictment alleges that on or about December 20, 1986 at the Aliamanu military housing area in the District of Hawaii the defendant, Darlina Karen France, did assault her husband, Neil France, by shooting said Neil France with a firearm causing serious bodily injury all in violation of 18 USC 113, Subparagraph A, 18 USC 113, Subparagraph F, and 18 USC 926, Subparagraph C.

[32] The government—the government prosecutor will describe the charges in more detail at the commencement of the trial. I've just given you a gist of the charges in order that you become aware and appreciate the nature of the charges, and whether it will effect your fairness in hearing this case.

At this time I would like to—

THE COURT: New jurors—

THE COURT: Oh, yeah. Okay. We'll fill in those two extra jurors.

THE CLERK: For position number five.

THE COURT: Number five.

THE CLERK: Juror Number 48, four eight, Mary Campbell.

(Pause)

THE CLERK: For position number 23, Juror Number 57, five seven, Warren Vrana.

THE COURT: Five seven, Vrana.

(Pause)

THE COURT: All right, at this time I would like to introduce to you the attorneys and the parties starting with the government. Would you introduce yourself and your associate at counsel table followed by defense counsel and his client at defense table?

MR. BENNETT: Yes, thank you, Your Honor. My name [33] Mark Bennett. I'm an Assistant United States Attorney for the District of Hawaii. With me at counsel table is John Blake, who's a special agent with the FBI here in Honolulu. Thank you, Your Honor.

THE COURT: Thank you.

MR. CASSIDAY: Good morning, ladies and gentlemen of the jury. My name is Ben Cassiday. I'm an attorney representing Karen France who's sitting beside me and the defendant in this case. Thank you, Judge.

THE COURT: All right. Thank you. Next I will ask the attorneys to inform you of the names of the witnesses they intend to call during the trial. A disclosure of the names of the witnesses is done to see if you might know these witnesses personally, and if so whether your friendship would effect your fairness in hearing and deciding this case. This would necessarily include persons who you may personally dislike. If you do not readily recognize a name and need additional information to jog you memory please feel free to raise your hand, if you feel that, "I may know that person," but you need additional information feel free to ask the husband's name, or where they live, employment background, et cetera. I might add that the fact that you may know a witness may not automatically excuse you because we all know people. The fact is that would that personal friendship effect your fairness? That is the [34] bottom line.

Also, we will be calling into Court people that will be bringing in the records. They're recordkeepers, office managers, custodian of records, and all they're doing is bringing in records to verify, authenticate the records so knowing these people I'm sure would not effect your fairness in hearing a case. All right, will the government announce the names of the witnesses it intends to call followed by the defendant?

MR. BENNETT: Yes, Your Honor. The government may call some or all of these witnesses during the trial of this case: Neil France, Stacy France, Ron Bucani (phonetic), Regina Bucani, Lisa Falk (phonetic), Virgil Falk, Carolyn Falk, David Bershbacher (phonetic), Jody Bershbacher, William Albrecht (phonetic), David MacLane (phonetic), John Berof (phonetic), Breta Channing (phonetic), David Chaimberlin (phonetic), Jean Copperman (phonetic), Laura Copperman, and an M.C. who's last name is Zolz, Z-o-l-z, an M.C. who's last name is Hetric, H-e-t-r-i-c-k, and Dr. Kenneth Shaver (phonetic).

THE COURT: Thank you, Mr. Bennett. Anyone need additional information? The record will note no response. All right, those who know or have business dealings with the witnesses whose names was just called by the Assistant U.S. Attorney? All right, record will note no response. [35] Mr. Cassiday?

MR. CASSIDAY; No, Your Honor.

THE COURT: All right. Thank you. The attorneys and the defendant have been previously introduced to you. Anyone know the defendant, Ms.—Mrs. France or any member of the immediate family? The record will note no response. Anyone know the defense counsel, Mr. Benjamin B. Cassiday, the third? All right, record'll note no response. Anyone know the Assistant United States Attorney, Mr. Mark J. Bennett or FBI Agent, Mr. Blake? Record will note no response. Anyone personally know any member of the staff on the United States Attorney's Office in the District of Hawaii? All right, record'll note no response.

This criminal case comes before you by reason of an indictment. The contents of this indictment will be further explained to you at the beginning of the trial itself. At this stage of the trial I have merely given you a brief description of the charges brought against this defendant. This defendant has pleaded not guilty and has thereby raised issues of fact to be resolved by a jury. I wish to impress upon you at the outset that the indictment returned by the Grand Jury is a formal document which the government uses to commence its charges against this defendant and upon which it brings its case into Court; and aside from this, the indictment serves no other purpose [36] whatsoever. The sole purpose of the indictment then is to serve as an accusation or charge which the United States makes against this defendant. It serves to inform the defendant of the crimes which she is being charged and tried. The indictment is not evidence against this defendant and affords no inference of her guilt. The defendant, under our system of law, sits in Court innocent and this presumption of innocence will be with her until the government, who has the burden of proof to establish her guilt beyond a reasonable doubt, proves her guilt accordingly. The burden of proof to so establish guilt beyond a reasonable doubt rests with the government and as such the defendant need not present any evidence in her own behalf. In other words, the defendant has no obligation whatsoever to present any evidence to prove that she is innocent, although she may do so. The defendant is not requried to present any evidence on her own behalf. She does have a constitutional right not to testify and should she decide not to take the stand and rely upon her constitutional right not to testify you are to make no inference of guilt or otherwise hold it against her.

Now, any prospective juror here cannot accept and follow the foregoing principles of law? All right, record will note no response.

Have you or any of your immediate family or close [37] personal friends ever serve as law enforcement officers, be police officers, FBI, Internal Revenue agents, security

guards, et cetera? All right, from the jury box no response. Oh, we have one. Okay.

MR. CASSIDAY: Your Honor, I think there were a couple of responses.

THE COURT: All right. All right, from the jury box here, the first row. Do I see any hands? Your number and name?

JUROR 42: Forty-two, Warner.

THE COURT: Warner? And who do you know?

JUROR 42: My brother.

THE COURT: Your brother? And what—what kind of law enforcement is he in?

JUROR 42: He works for the OCC.

THE COURT: Works for OCC. O triple C. He's a correction officer.

JUROR 42: Yes.

THE COURT: How long has he been a corrections officer?

JUROR 42: Four years. Four.

THE COURT: Four years. Do you see your brother often?

JUROR 42: I live with him.

THE COURT: I see. Do you discuss with him his [38] work?

JUROR 42: No.

THE COURT: No. All right, the fact that your brother works for O Triple C, which is our prison here, and this is a criminal case, would that make you feel uncomfortable in hearing a case?

JUROR No.

THE COURT: You think you can be fair to both sides?

JUROR 42: Yes.

THE COURT: That's all we ask. Thank you. Second row. Yes, your number?

JUROR 48: Forty-eight.

THE COURT: Last name?

JUROR 48: Campbell.

THE COURT: Campbell. All right. How are you related to a law enforcement?

JUROR 48: I don't—no, I don't. related to the defendant, but I know some police officer.

THE COURT: All right, who do you know?

JUROR 48: Milton Yuen.

THE COURT: And how is he related to you?

JUROR 48: He's my godson.

THE COURT: Godson, and he's with the HPD, Honolulu Police Department?

[39] JUROR 48: Yes.

THE COURT: How long?

JUROR 48: About 13 or 14 years.

THE COURT: Okay, and do you see your godson often?

JUROR 48: No.

THE COURT: When you see him—when do you see him? Once a year?

JUROR 48: He comes to the house once in awhile.

THE COURT: I see, and do you—does he discuss law enforcement?

JUROR 48: No, he doesn't.

THE COURT: He doesn't. All right. The fact that you have a godson who is a policeman, and this is a criminal case, you think you can be fair to both sides?

JUROR 48: I should be.

THE COURT: Okay. Well, you've got to be sure.

JUROR 48: Yes.

THE COURT: Okay. Anybody else? All right, let's go to the left—the right side of the courtroom. All right, sir, your number?

JUROR 43: Forty-three, Wilson.

THE COURT: What number?

JUROR 43: Forty-three.

THE COURT: Forty-three, Wilson. Yes, Mr. Wilson.

[40] JUROR 43: I fish with a lot of cops.

THE COURT: Go fishing.

JUROR 43: Yeah.

THE COURT: And how often do you go fishing?

JUROR 43: Every day off I get in a week.

THE COURT: How many officers?

JUROR 43: About six of 'em.

THE COURT: And these are HPD officers.

JUROR 43: Yeah.

THE COURT: Honolulu Police Department. Now, do you people discuss law enforcement?

JUROR 43: No.

THE COURT: You don't. Now, this is a criminal case and we expect you—you give both sides a fair shake. The fact that you have friends and go fishing with policemen, would then in any way favor one side over the other?

JUROR 43: No.

THE COURT: All right. You think you can give both sides a fair—fair trial.

JUROR 43: Yes.

THE COURT: All right. Thank you, Mr. Wilson. All right, anyone in the first row? Second row? Yes, your number and name?

JUROR 20: Twenty, Lee.

THE COURT: Twenty-eight?

[41] JUROR 20: Twenty.

THE COURT: Twenty. Your last name?

JUROR 20: Lee.

THE COURT: Lee. All right, who do you know?

JUROR 20: FBI Agent.

THE COURT: And how is he related to you?

JUROR 20: Just a friend.

THE COURT: Okay, and what's his name?

JUROR 20: Hilton Lui.

THE COURT: Hilton Lui. How long have you known Mr. Lui?

JUROR 20: Oh, about for 10 years.

THE COURT: Ten years, and do you socialize with him?

JUROR 20: No, hardly.

THE COURT: Hardly. When the last time you saw him?

JUROR 20: Oh, quite some time ago, over a year ago.

THE COURT: Over a year ago.

JUROR 20: Yeah.

THE COURT: All right. You understand that the witnesses in this case is an FBI agent and you know Mr. Lui, who is an FBI agent. Would that in any way affect your fairness in hearing his case?

[42] JUROR 20: No.

THE COURT: You think you'd be fair to both sides.

JUROR 20: Yes.

THE COURT: That's all we ask. All right, anyone else? Let's get back here. You number?

JUROR 1: Number 1.

THE COURT: Last name?

JUROR 1: Akana.

THE COURT: Yes, Mr. Akana.

JUROR 1: I know the police chief on Kauai.

THE COURT: And how are you—are you related to him?

JUROR 1: No.

THE COURT: And how often do you see him?

JUROR 1: Once for two months and once for three months.

THE COURT: Again, same question. Do you people sit down and talk about law enforcement?

JUROR 1: Never.

THE COURT: All right, this is a criminal case. The fact that you know the chief of police of Kauai, would that in any way effect your fairness in hearing this case?

JUROR 1: None whatsoever.

THE COURT: You'd give both sides a fair shake.

JUROR 1: Right.

THE COURT: All right. Anyone else in the right section—center section? Sir?

JUROR 21: Number 21, Lemmons.

THE COURT: Yes, sir.

JUROR 21: I am employed at OCC, state correctional officer—adult correctional officer.

THE COURT: I'm sorry?

JUROR 21: I am a—I'm a adult correctional officer at OCC.

THE COURT: Oh, I see. You are an adult correction officer.

JUROR 21: Yes, sir.

THE COURT: And how long have you served in that capacity?

JUROR 21: Three years, sir.

THE COURT: Three years. And this being a criminal case, Mr. Lemmons, and you are a Triple C Correction Officer, would that in any way effect your feeling about deciding a criminal case?

JUROR 21: No, sir.

THE COURT: You think you can be fair to both sides?

JUROR 21: Yes, sir.

THE COURT: All right, basically all you do is just take the evidence as given to you in this courtroom, [44] not from outside, and then take the law as given to you by the judge and then apply it. That's all we ask, all right? Anyone else? All right, sir.

JUROR 27: Number 27, Marouchoc.

THE COURT: Yes.

JUROR 27: I have occasional contact with Mr. Lui of the FBI and Mr. Cole, the vice president's counsel are on Drug Intervention. I'm the security manager at Fort Shafter.

THE COURT: As a department of OCC?

JUROR 27: Yes, sir.

THE COURT: Civilian?

JUROR 27: Yes, sir.

THE COURT: You're in security.

JUROR 27: Security military information and counter intelligence.

THE COURT: Oh, I see. It's not the police type of—

JUROR 27: That's right, it's not.

THE COURT: All right. Same question. Would that fact influence your fairness in hearing this case?

JUROR 27: No, Your Honor.

THE COURT: All right, thank you. Anyone else? All right, record'll note no further responses. Law enforcement officers will be testifying as witnesses in this [45] case. Would any of you be inclined to give more credence to the testimony of a law enforcement officer than a civilian witness simply because he is a law enforcement officer, or simply put, would you believe a law enforcement officer more than a civilian just because he is a law enforcement officer? All right, record'll note no response.

Now, we flip the coin, on the other hand would any of you be inclined to give less credence to the testimony of a law enforcement officer than a civilian witness simply because he was a law enforcement officer would you be less believing just because he's an officer? The record will note no response.

Anyone here is a lawyer, studied law, married to a lawyer, or worked in a law office, or is working in a law office? All right, we have one back here. Your number and name?

JUROR 9: Number 9, Margaret Donegan.
THE COURT: Number 9?
JUROR 9: I was married for 18 years to an attorney. He died three years ago.
THE COURT: Oh, I see. Passed away. And did he do any criminal work?
JUROR 9: Yeah.
THE COURT: Hmm?
[46] JUROR 9: Yes.
THE COURT: He did? All right. And did he discuss with you—
JUROR 9: He was in this courtroom twice for two cases.
THE COURT: That's—
JUROR 9: Just two.
THE COURT: Your husband is Donegan?
THE COURT: And you say he was doing criminal work?
JUROR 9: Criminal and civil.
THE COURT: Civil. All right. Did you discuss with your husband while he was alive about criminal law and—
JUROR 9: No so much criminal, no.
THE COURT: All right. This is a criminal case. Would that in any way, the fact that your husband was a lawyer, effect your feeling or your fairness in hearing his case?
JUROR 9: No.
THE COURT: No. You have no opinion as to one way or the other. All right, thank you, Ms. Donegan. Anyone else? Yes.
JUROR 37: Thirty-seven, Rivera. I did study as a [47] legal assistant, but presently I'm not practicing.
THE COURT: A legal assistant. How long ago?
JUROR 37: From '82 to about '85.
THE COURT: And which law firm?

JUROR 37: I was an independent contractor so I didn't really work for a firm per se.
THE COURT: Do you have a law degree?
JUROR 37: Yes.
THE COURT: Oh. You're a legal steno?
JUROR 37: Legal assistant. I do have a—a graduated—
THE COURT: I see. Do you qualify as a paralegal?
JUROR 37: Yes, I'm qualified—
THE COURT: Oh, you're a paralegal.
JUROR 37: Yes.
THE COURT: All right, did you do any criminal work?
JUROR 37: No.
THE COURT: No. All right. Do you feel you can be fair and impartial in hearing this criminal case?
JUROR 37: Yes.
THE COURT: All right, thank you. Anyone else? All right, record will note no further responses. Anyone here, because of the nature of their employment, because the type of work they do would feel uncomfortable in the sense [48] that they may not be able to judge this case impartially? We had a few, which I question. All right, record'll note no responses. Any prospective juror member here ever sue the U.S. government or was sued by the U.S. government? Basically we ask that question so that—find out if you have bad feelings against the government. I guess we have, but not enough to make you be biased. All right, anyone has sued the government or has sued? All right, record'll note no response. Anyone here was a victim of a crime? All right, record'll note no response. Anyone here testified in a criminal case either for the government or for the defense? We have one. All right, you're Mr.—Juror 21?
JUROR 21: Twenty-one.
THE COURT: Yes. You've testified in a criminal case.
JUROR 21: Yes, sir.

THE COURT: And were you subpoenaed?

JUROR 21: Yes, sir.

THE COURT: I see. And what kind of case was that?

JUROR 21: It's an assault case that's in—where I was assaulted by an inmate.

THE COURT: Oh, in other words, an assault within the prison.

JUROR 21: The OCC itself.

[49] THE COURT: Oh, I see. There were two inmates involved in a fight?

JUROR 21: No, sir. An inmate and myself where he assaulted me.

THE COURT: Oh, I see. All right. This is an assault case also. You being a victim of assault, would that in any way color your thinking in hearing this case?

JUROR 21: No, sir.

THE COURT: All right. Anyone else? The record'll note no further responses. A handgun was used in this case. Have anyone ever support any gun control legislation? In other words against guns. All right, record will note no response. Assuming that alcohol consumption was involved in this case, there was some drinking, would this fact color your perspective in that you may not be able to fairly and impartially hear this case? All right, record will note no response. Have any of you had experience or done any work with a program or agency concerned with drug or alcohol abuse? All right, record'll note no response. Anyone here read in the newspapers, seen on television, or heard on the radio anything about this case? All right, record will note no response. Having heard the questions put to you by the Court does any other reason suggest itself to you as to why you could not sit on this jury and render a fair verdict based on the evidence [50] presented to you in the context of the Court's instruction to you on the law? Did I miss anything? All right, record'll note no response.

Now, we get to a point where the attorneys are anxiously waiting, would like to know something about you 32 jurors. Now, instead of me asking you questions I'm gonna pass out some questionnaires. I'll give you time to read the questions. They're very simple. Something about your background, married, working, how many children, et cetera, and without reading the question would you answer the question and we will assist you. Now, you will note that in the State Court—in a State Court the jurors are called from Oahu only, but you will note that in the Federal Court we draw our jurors from the entire state so in a way I'm sure you're curious to know who's sitting next to you because some are from outside islands, and I always know which juror is from the outside island because they show up in Court with a small handbag. They expect to stay over, see. Read the questions and I'm going to ask first row, first question to you to stand up and then as loud as you can answer the questions that's on the list. You need more time?

JUROR 5: No, sir.

THE COURT: All right, fine, and we'll go down the line and jump back to you, sir.

[51] JUROR 5: My name is Harriott Michele Dominque Pichez (phonetic) Burrell. I've been a resident of this state for approximately 17 years. I am single. I'm a nurse at Kaiser Hospital for almost seven years. I'm not married. I have two children, seven and 12, and I have no one living with me.

THE COURT: All right, thank you. All right, next?

JUROR 55: My name is Harold Suetani. I'm from Wahiawa. I'm—I live there 58 years, married, have five children. I work at Hawaiian Electric Company for 33 years. I was in the service in Korea, and —and I'm still working at the Hawaiian Electric.

THE COURT: Mrs.—what is your wife's first name?

JUROR 55: My wife's first name is Lidau (phonetic).

THE COURT: Where does she work?

JUROR 55: Pardon me?

THE COURT: Where does she work?

JUROR 55: She doesn't work. She's at home.

THE COURT: Housewife.

JUROR 55: Housewife.

THE COURT: All right. Thank you very much. Mr. Kon?

[52] JUROR 17: My name is Harry M. Kon. I've been livin here for 28 years. I've just been married. My occupation is a passenger agent for Wardair Canada. My wife's name is Andrea Kon. We have no children yet.

THE COURT: One on the way.

JUROR 17: One on the way. No military, I'm not retired, and I still live with my parents for the next two months.

THE COURT: All right. Thank you, Mr. Kon. Incidentally, if you ladies live all your life in Hawaii don't tell us how many years, just say all my life. Okay? All right, Mr. Higa.

JUROR 52: My name is Walter Higa from Koko Head. I've lived in Hawaii all my life. I'm single. I work at Hickam Air Force Base for six years. I was in the Air Force for six years and 10 months.

THE COURT: All right, thank you, Mr. Higa. Mr. Makua.

JUROR 24: My name's Michael Makua. I live in Moiliili. I lived there all my life. Single. Work for Hoitang and Butch (phonetic) for 22 years and National Guard for six years.

THE COURT: All right, thank you, Mr. Makua.

JUROR 54: My name is Manuel Perreira. I lived in Hawaii all my life. I'm married. My wife is alive. [53] Occupation at Pearl Harbor Naval Shipyard for 55–50–55 years. My wife's name is Helen Perrerira, retired from Kaluma (phonetic) High–Kamuma (phonetic) High School. I have three children. I don't know what their age are though. They're all married. I was in National Guard for seven years. I–I been retired for–at 55, so I'm 70, so that's what? Twenty-five–27 years? I have no relatives stay with me right now.

THE COURT: All right, thank you.

JUROR 54: Only my wife and myself.

THE COURT: Don't feel bad. I have one son and I still don't know his age.

JUROR 54: I have three.

JUROR 42: Theresa Warner from Laie, Oahu. I've been resident for Hawaii all my years and right now separated. My occupation is seamstress for the Polynesian Cultural Center. My husband's name was Edward–is Edward Warner. I have one boy. I live–in fact my brother lives with me. He has a wife and four children.

THE COURT: What does your brother do for a living?

JUROR 42: He works for that Triple C.

THE COURT: Oh, Triple C. All right, thank you.

JUROR 51: My name- excuse me, my name is Cathy Kim and I live in Mililani Town. I've been here all my life. [54] I'm married. I'm an operations supervisor for two years. My husband's name is Milton and he's self-employed. I have no children and I have no one living with me.

THE COURT: All right, thank you. Maybe you can–I'm sure you've got a loud voice. You can–

JUROR 23: Beg pardon?

THE COURT: You have a loud voice. You can do it from there without coming down.

JUROR 23: Yes.

THE COURT: Sure.

JUROR 23: My name is George Maehara. I live in Kaimuki, and I've been living here all my life. I'm married. I work at Camp Smith for the federal government. My wife's name—my wife's name is Juliet and she also works for the federal government. She's employed as a (indiscernible). We have two children. I was drafted in the Army, served for two years.

THE COURT: All right, thank you. Ms. Portillo?

JUROR 35: I'm Catalina Portillo. I live in Makiki. I stay here in Hawaii for 31 years. Married. My occupation is Hawaii aid almost one year and relief services at the (indiscernible) center. Married to (indiscernible) Portillo. He's a production security manager. I got one child. (Indiscernible) 14 years old. And I'm not retired. I'm not retired and I don't live any other people.

[55] THE COURT: Your husband worked what kind of security?

JUROR 35: Security at Black Hills of Hawaii.

THE COURT: Oh, Black Hill.

JUROR 35: Yeah.

THE COURT: He wears a uniform? Policeman's uniform?

JUROR 35: Just regular work—

THE COURT: Oh, regular work.

JUROR 35: Yes.

THE COURT: Carry gun?

JUROR 35: No.

THE COURT: All right, thank you. Mr. Akana.

JUROR 1: My name is William Akana from Wailua, Kauai. I've been a resident here all my life. Married. I own an insurance agency and my wife's name is Margaret and she works for me. I have one son 25—26 and he works for me, and I've been in the Army for two years.

THE COURT: All right, thank you, Mr. Akana. Ms. Rivera?

JUROR 38: My name is Yolanda Rivera. I live in Kilauea, Kauai and I work for Princeville as a chambermaid for 14 years. I have four children, ages are 25, 23, 21, and 18. I'm not retired yet but I think it's progress.

THE COURT: All right, thank you.

[56] JUROR 48: My name is Mary Campbell. I'm a widow. I live here all my life. I have two children that's married. One is divorced and the other is still married, and I have seven grandchildren.

THE COURT: Are you working?

JUROR 48: Hmm?

THE COURT: Are you working?

JUROR 48: No, I'm retired.

THE COURT: Retired. What kind of work did you do?

JUROR 48: A little bit of everything.

THE COURT: Oh, a little of everything. All right, thank—

JUROR 48: I retired 11 years ago.

THE COURT: Eleven years. All right, thank you.

JUROR 44: My name is Jack Yama. I've been living here all my life, and I'm a widower, and I have three sons. Two serve in the military and I've been retired for 16 years.

THE COURT: What kind of work did you do, Mr. Yama?

JUROR 44: I used to building/maintenance inspector.

THE COURT: All right. Thank you.

JUROR 37: I'm Linda Rivera. I've lived here all my life. I'm single. Presently I'm a realtor associate for [57] Century 21. Let's see, I also have a sister who works for the DOE who lives with me.

THE COURT: All right. Thank you.

JUROR 9: Meg Donegan from Kailua. I've lived here 21 years from New York. I'm a widow. I work at the (indiscernible) Center at the University of Hawaii for the Jesuit order. I have five children. They're 30, 29, 26, 25,

and 19. My oldest one is a garbologist and he converts garbage in Florida to electricy. I have a son in management that just was hired by Bank of Toronto. I have a daughter in Arizona that's a hostess. I have a son in Pauao, and he's computer specialist, and I live with my youngest daughter, 19, which is a freshman at Chaminade.

THE COURT: He's a garbologist.

JUROR 9: Yes.

THE COURT: He won't have any trouble finding work.

JUROR 9: No.

THE COURT: Never run out of garbage. All right, let's go—yes.

JUROR 3: I'm Lisa Bernhardt. I live in Kaawa for eight years. My husband's name is Ken and he's a draftsman. We have a son that's two. We're not retired. In military, no. He was four years ago, and my mom was living with us for a few months, but she found her own place.

[58] THE COURT: All right, thank you.

JUROR 50: My name is Sally Kido. I'm from Aiea and I've been a resident of Hawaii all my life. I'm married. I'm a housewife. My husband's name is Fomeo Kido (phonetic). He retired from Pearl Harbor Shipyard. I have two children, 29 and 32. My daughter is a speech pathologist, my son is an electrical engineer. Let's see—

THE COURT: Thank you, Ms. Kido.

JUROR 47: My name is Thelma Aana. I've been a resident of—all my life in the state of Hawaii. I'm married and I have 25 years with the Army but presently for five years I'm workin' as a warehouse worker for the Army at Kapalama Military Reservation. I have four children and one is 33. She's an education specialist for Cam School on Kauai, and I have a son that's 30. He's a fireman/paramedic on Kauai, and I have another son, 27, he's an electronic tech on Kauai for the cocaine tracking station, and I

have a daughter 23, she's presently a nursing student at the UH.

THE COURT: All right, than you.

JUROR 32: My name is George Nip from Mililani. I've been in Hawaii for 30 years, which is most of my life. I'm single and I presently work as an accounting manager at Oceanic Properties.

THE COURT: All right. Thank you. Mr. Wilson?

JUROR 43: My name's David Wilson. I'm from [59] Kalihi. I live here all my life. I'm single but I live with this girl for 11 years. We have two children and she works for Interested Parties, an exchange on Ala Moana Boulevard. No military, and I work for Foodland Meat Company.

THE COURT: Foodland. Thank you.

JUROR 36: My name is Felicitas Remiglo. I've been here in—from Kalihi. I've been here in Hawaii for 17 years. I'm married. I work here in Federal Building as a custodian and my husband retired from U.S. Army, Fort Shafter, and we have three children, 15,—ages 15, 14, and 12.

THE COURT: Thank you.

JUROR 20: My name is Norman Lee. I live here in the part of Kaimuki. I live here all my life. I'm a business loan officer at Bank of Hawaii for about a little over a year and I—I served in the National Guard for eight years.

THE COURT: Thank you.

JUROR 14: My name is Ray Ishihara from Waimea, Kauai and I lived there all my life. I am assistant manager, meat cutter, fish cutter for Ishihara Market, and I'm single, and I live with my parents.

THE COURT: All right, thank you, Mr. Ishihara.

JUROR 57: My name is Warren Vrana. Been a [60] resident for 19 years. I'm married. I'm a teacher with Venicular (phonetic) section of Pearl Harbor. Been at that for 15 years. My wife's name is Marilyn. She's currently a

housewife. No children, military service, currently employed, and no friends or relatives living with me.

THE COURT: Thank you.

JUROR 4: My name is William Biga from Lanaina, Maui. I live there all my life. I'm married. My wife's name is Billie Biga. I have four kids, five, four, three, and two, and I work for Hawaii Beautiful.

THE COURT: Is your wife working?

JUROR 4: Housewife.

THE COURT: Housewife. Thank you, Mr. Biga.

JUROR 22: My name is Jason Lum. I live in Kaneohe. I lived there all my life. I'm single. I work at Au's Plumbing. I'm a sheetmetal worker and I live with my parents.

THE COURT: Thank you.

JUROR 13: My name is Jon Inafuku. I live in Oahu. I live there all my life. I'm single. I work at Casing and Grading, Incorporated. I've worked there six years and I live with my parents.

THE COURT: All right, thank you.

JUROR 8: My name is Justina Desuacido. I'm from Mililani. I've been a resident of the state 15 years. I'm [61] married. I work as a tax foundation employee. My husband's name is Robert. He works at Wanhola (phonetic) Hospital. We have two children, eight and four.

THE COURT: Thank you.

JUROR 59: My name is David Wong from Pearl City. I living here all my life, single, optic technician for Circle Office Systems, still living with my parents.

THE COURT: Thank you, Mr. Wong.

JUROR 18: Garrett Kuehu from Wainea, Kauai. I've lived there all my life, single, equipment operator for (indiscernible).

THE COURT: All right, thank you.

JUROR 41: My name is Joe Tato. I live in Honolulu. I've been living here for nine years. I'm single. I work as a

respiratory therapist at Kaise, at Straub (phonetic), and sometimes I do home care work with Gastraub (phonetic). No military service and I'm not married.

THE COURT: Thank you. All right, that completes—would the—would the attorneys for the first trial approach the bench?

(Bench conference on the record)

THE COURT: The Court has completed its voir dire questions. Do you have any voir dire questions you would like the Court to ask at this time?

[62] MR. BENNETT: Yes, Your Honor. Did the Court get the government's proposed voir dire?

THE COURT: Yes, I did.

MR. BENNETT: Okay. I think in this case I'd like the Court to ask our question number three, which asks about whether the jurors have themselves been involved in any kind of serious domestic problems, or whether their close relatives or very close friends have similarly been involved in serious domestic problems because I think in a case involving a serious domestic dispute that's an important—an important issue.

THE COURT: Well, the reason I decided not to give that because of I generally give it—not even a domestic problem. Now, what serious domestic problem is confusing. What is serious? I mean each juror may think what happened was serious in his life. I think it's just going to open a pandora box. We all have domestic problems unless you can be specific like "Have any of you shot your husband? I'd like to know?" I'll rely on you—

MR. CASSIDAY: I've got to object to that, Your Honor.

MR. BENNETT: I mean, I think if there's been any kind of violence or close friends or close relatives that have had violence, and from that stipulations. I think that that's important to know really for both sides, whether they

[63] might have been victim of it, or they might have been a perpetrator of it, or—or have close friends who are—who are very close friends, or close relatives who are either victims or perpetrators. I think that that's important.

THE COURT: Weil, that question would—would be of interest to the defendant or to the government? That question would apply to the defendant or the government?

MR. BENNETT: Well, I think—I think the answer would be important to both sides in picking a jury.

THE COURT: Well, you will note that I initially asked—they know the nature of this case. I told them it was a shooting of a husband. I did ask that, the nature of the case, knowing the nature of the case, would that in anyway effect (indiscernible). I think that answer's not needed. Did they shoot their husband before they'll let me know. All right, I would—the Court has reason to decline. Do you have any additional—

MR. CASSIDAY: There's just two errors that are a little concern to my client. First of all, it's been my experience that some people are adamantly opposed to the private ownership of handguns, and I've had people say they couldn't sit on juries if the handgun was involved. I know you asked the question—

THE COURT: About the gun control.

MR. CASSIDAY: Yeah, about gun control, but if you could just follow that up by just asking if anybody is so [64] adamantly opposed to handguns—the use and private ownership of handguns they couldn't sit on the case. That would be one thing, and then the other thing is that the victim of the case is—is a Vietnam veteran and it's been my experience also that some people have very strong positive or negative feelings relative to Vietnam veterans.

THE COURT: I also consider the question similarly like Mr. Bennett. I'm going to refuse the first one because I did

ask the question. Secondly, I told them all the nature of this case. If they really can't handgun they woulda let me know. They know the position of the case.

MR. BENNETT: I have no objection to having that question asked. The one about the—the handgun.

THE COURT: And then secondly, I don't think people either love or hate the Vietnan veteran, first—first—I'll deny that.

MR. BENNETT: I would indicate that with regard to the one question about handguns, I have no objection to the Court asking it and I don't think it would take very long and I think—

THE COURT: All right.

MR. BENNETT: —I think counsel's—

THE COURT: Anything else?

MR. BENNETT: —entitled to know it.

THE COURT: Anything? All right, I'll ask the [65] last question over.

(End bench conference discussion)

THE COURT: Ladies and gentlemen, the prospective jurors then, I have one last question. As you know, this case involved the use of a handgun, which is a pistol or revolver, and anyone here feel so strongly against owning handgun, I mean, licensed handgun or registered handgun, that they feel that they cannot fairly hear this case? All right, record'll note no response. I'm gonna take a short recess. You've been very patient, and during that recess I expect attorneys to work on their preemptory challenges.

Ladies and gentlemen of the prospective jury panel, you all have been passed for cause and now the attorneys will be permitted to exercise their respective preemptory challenges. Again, if you are excused do not take this personally because you may be excused for reason beyond your control, nothing to do with your character or your in-

tegrity. All right? Something in your background that you cannot control may have effected the attorneys and ask that you be excused to hear this case. You may be perfectly qualified to sit on a civil case or another criminal case. We'll take a ten-minute break. Would you be back here by 11:40. All right? Thank you.

THE CLERK: All rise. His Honor the Court stands in recess for 10 minutes.

[66] (Jury out at 11:27 a.m.)

(Recess at 11:27 a.m., until 11:42 a.m.)

(Jury in at 11:42 a.m.)

(Call to Order of the Court)

THE COURT: Please be seated.

THE COURT: All right, the record will note the presence of the parties and their respective attorneys. We'll take a short pause while the attorneys complete their respective preemptory challenges.

(Off the record at 11:43 a.m., until 11:51 a.m.)

THE COURT: The Court will excuse the following jurors. When you're excused would you return to the—remain in the courtroom because you'll be involved in the second jury selection. All right, so don't leave the courtroom. Court will excuse the following prospective jurors: Juror 23, Mr. George Maehara; Juror Number 1, Mr. William Akana; Juror 48, Mary Campbell; Juror 44, Jack Yama; Juror 37; Linda Rivera; Juror 9, Margaret Donegan; Juror 55, Harold Suetani; Juror 17, Harry Vaughn—Kon—Harry Kon; Juror 52, Walter Higa; Juror 42, Theresa Warner; Juror 3, Lisa Bernhardt; Juror 50, Sally Kido; Juror 4, William Biga; Juror 57, Warren Vrana; Juror Two Zero, Norman Lee; Juror 8, Justina Desuacido; Juror 18, one eight, Garrett Kuehu; and lastly, Juror 41, Joseph Tato. All right.

[67] (Pause)

THE COURT: All right, I can finally address you as members of the jury. You have now been selected as jury to try the case of United States of America versus Darlina K. France. The trial will commence as indicated, tomorrow, at which time you will be further instructed by the trial judge as to your duties and functions as a jury. In the meantime you must not discuss the case in any manner among yourselves or with anyone else, and you must not permit anyone to attempt to discuss it with you or in your presence. You are further instructed that in order to avoid even the appearance of impropriety you should have no conversation whatsoever with either the lawyers in this case or with anyone you may come to recognize as having some connection with the case.

You must also avoid reading any newspaper articles that might be published about the case and you must also avoid listening to or observing any broadcast news program on either televison or radio because of the possibility that mention might be made of this case during such a broadcast. The reason for these cautions, of course, lies in the fact that it will be your duty to decide this case solely on the basis of the testimony and evidence presented during the trial without consideration of any other matters whatsoever.

[68] The criminal trial will progress this way, the government attorney, the prosecutor, will start the trial by making an opening statement. In his opening statement he will attempt to outline what the government hopes to prove in this case. In his opening statement he will, by brief description of the case, attempt to give you an outline or sort of a bird's eye view of the case so that you may be able to logically and intelligently follow the testimony, the evidence, and the direction of the trial.

The defense attorney may or may not make an opening statement, and this decision is solely up to him. You

should not give any weight or inference one way or the other of the innocence or guilt of this defendant just because the defense attorney makes or did not make an opening statement.

Then the government will follow its opening statement by presenting its evidence, and when the government feels it has completed presenting its case it will indicate this by informing the Court that the government rests. When the government rests its case the defendant may or may not introduce any evidence, or may or may not testify. As previously instructed, the fact that the defendant does not introduce any evidence or does not take the stand should not be in any way held against her because the burden of proving the defendant guilty always rests with the government.

[690 Both sides having rested, you will hear arguments from the attorneys. You will note that the prosecutor will address you on two occasions while the defense attorney only once. This is fair and according to the law because the government has the burden, the—permitted to address you twice. Once, the opening argument, and then rebuttal argument. The government will make his opening argument followed by defendant's final argument and then by the government's rebuttal argument. After the attorneys have completed their arguments the Court will instruct you on what the law is as it is applicable to this case, then you will retire into the jury room to deliberate.

The Court has reserved for you two rooms for your use and comfort. It's sitted—situated on both sides of the elevator. I would strongly recommended that you use these room for your comfort and stay close to these rooms so in case the trial resumes they can readily reach you. This is also to prevent any accidental contact with any witnesses in the case or coming in contact with the public.

The Court will issue each of you jurors identification badge indicating that you are a juror. Please wear this at all times while in the courthouse because the public and the witnesses may not be aware of your status. Once you wear this badge people will stay away from you.

You will also note that throughout the trial that [70] the attorneys, both the prosecution and the defense attorney will not be all too friendly with you. This is because as attorneys involved in this trial, ethically they cannot even show an appearance of impropriety, meaning they cannot be seen talking to you. They probably will say, "good morning" or "good afternoon." This is about all. If you ask questions they will look you coldly and walk away, so don't hold it against the attorneys. They are forbidden to talk to you.

If you receive a parking citation give it to the Court Clerk. Do not park at a tow away zone because then the Court cannot assist you on that.

We have a cafeteria in the next building. This is the courthouse building. Do you know this is separate from the administration building? There's a cafeteria in the fourth—fifth floor you may use. They open for breakfast at 6:30 a.m. and lunch continues til 3:30. You're free to use that cafeteria facilities.

In this particular case, this criminal case, the trial will go from 8:30 to one o'clock and recess for the day. All right. One o'clock will be the recess. Tomorrow special—

THE CLERK: That's for the civil case.

THE COURT: Oh, that's for the civil case? Oh, I'm sorry, I got confused with the next case. This case [71] will go from 8:30—I'm sorry, from nine o'clock to one—one—12:00 noon, take a lunch break, come back at 1:30 and go until 4:00 or 4:30 depending on the scheduling. You will report—this jurors report tomorrow, 8:30. Be sure you come down at 8:30 to Room C-306. That's the

third floor by the clerk's office. As long as you go down to the clerk's office they'll direct you to the jury room, 8:30, Room zero – I'm sorry, C-306.

Will the attorneys in this criminal case approach the bench?

(Bench conference on the record)

THE COURT: For the record, would you like – is there any objection you'd like to make in the manner in which the jury was selected?

MR. BENNETT: No, Your Honor.

MR. CASSIDAY: No, Your Honor.

THE COURT: Thank you, gentlemen.

(End of bench conference)

THE COURT: The Court at this time will excuse the two – 12 jurors and two alternates who were qualified and selected together with the attorneys and clients. Again, tomorrow, 8:30, Room 306. Will the court rise? You're – you're excused. You're excused. Go ahead.

(Whereupon at 12:01 p.m. the proceedings in the above-entitled matter were adjourned to reconvene at 9:00 a.m., on [72] April 28, 1987.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Marie Stephens
Transcriber

March 14, 1988
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CR. No. 87-00079

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DARLINA K. FRANCE, DEFENDANT

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date August 7, 1987, with counsel Benjamin Cassiday, Esq.

There being verdict of guilty. Defendant has been convicted as charged of the offense(s) of having on or about December 20, 1986, in the District of Hawaii, committed assault with a dangerous weapon, the lesser included offense, in violation of Title 18, United States Code, Section 113(a), as charged in Count 1 of the Indictment and committed assault resulting in bodily injury, in violation of Title 18, United States Code, Section 113(f), as charged in Count 2 of the Indictment; and used and carried a firearm during and in relation to crimes of violence in violation of Title 18, United States Code, Section 924(c) as charged in Count 3 of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the

court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of as to both counts 1 and 3:

It is adjudged that the imposition of sentence is hereby suspended and that the defendant is placed on probation for a period of THREE (3) YEARS upon the following terms and conditions:

1) That the defendant comply with all local, state and federal laws.

2) That defendant comply with the lawful direction of the Probation Office.

3) That the defendant shall not at any time, place, nor for any purpose, ingest any alcoholic beverage.

Probation shall commence upon release from confinement. The sentence as to probation imposed on Count 2 shall run concurrently with that imposed on Count 1.

AS TO COUNT 3:

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of FIVE (5) YEARS.

IT IS FURTHER ORDERED that the defendant pay a special assessment of $50.00 as to each of Counts 1, 2 and 3.

/s/ Robert J. Kelleher
U.S. District Judge

Supreme Court of the United States

No. 89-1363

UNITED STATES, PETITIONER

v.

DARLINA K. FRANCE

ORDER ALLOWING CERTIORARI

Filed April 23, 1990

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

April 23, 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/30015

No. 89-1263

FILED
JUN 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

BRIAN J. MARTIN
Assistant to the Solicitor General

J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this Court's decision in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), requires reversal of respondent's convictions even though she did not object to a magistrate's conducting voir dire and even though her attorney expressed no objection to the manner in which the jury was selected.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Rules involved	2
Statement	2
Summary of argument	6
Argument:	
Respondent forfeited her right to have a judge preside over voir dire because she did not object to the magistrate's role in selecting the jury	9
A. The contemporaneous objection rule serves important purposes in criminal litigation	10
B. No exception to the contemporaneous objection rule is applicable to this case	13
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, No. 89-839, cert. granted (Mar. 26, 1990)	18
Bram v. *United States*, 168 U.S. 532 (1897)	17
CFTC v. *Schor*, 478 U.S. 833 (1986)	20
Chapman v. *California*, 386 U.S. 18 (1967)	17-18
Davis v. *United States*, 411 U.S. 233 (1973)	24
Engle v. *Isaac*, 456 U.S. 107 (1982)	22, 27, 29
Escobedo v. *Illinois*, 378 U.S. 478 (1964)	24
Estelle v. *Williams*, 425 U.S. 501 (1976)	11, 22
Gomez v. *United States*, 109 S. Ct. 2237 (1989)	4, 6, 9, 19
Government of the Virgin Islands v. *Williams*, 892 F.2d 305 (3d Cir. 1989)	6
Grosso v. *United States*, 390 U.S. 62 (1968)	23
Guam v. *Yang*, 850 F.2d 507 (9th Cir. 1988)	5, 21, 24, 25
Hill v. *United States*, 261 F.2d 483 (9th Cir. 1958)	10
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	11
Levine v. *United States*, 362 U.S. 610 (1960)	11

Cases—Continued: Page

Lowenfield v. *Phelps*, 484 U.S. 231 (1988) 29
Luce v. *United States*, 469 U.S. 38 (1984) 12
Martone v. *United States*, 435 F.2d 609 (1st Cir. 1970) 25
Miranda v. *Arizona*, 384 U.S. 436 (1966) 23
Myers v. *Washington*, 646 F.2d 355 (9th Cir. 1981) 27
Reed v. *Ross*, 468 U.S. 1 (1984) 22, 23
Rose v. *Clark*, 478 U.S. 570 (1986) 16, 17
Segurola v. *United States*, 275 U.S. 106 (1927) 11
Tumey v. *Ohio*, 273 U.S. 510 (1927) 17
Turner v. *Murray*, 476 U.S. 28 (1986) 18
United States v. *Atkinson*, 297 U.S. 157 (1936) 20
United States v. *Bamberger*, 456 F.2d 1119 (3d Cir. 1972), cert. denied, 413 U.S. 919 (1973) 12
United States v. *Bascaro*, 742 F.2d 1335 (11th Cir. 1984), cert. denied, 472 U.S. 1017 (1985) 12
United States v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986) 5, 25
United States v. *Broce*, 109 S. Ct. 757 (1989) 24
United States v. *Brown*, 493 F.2d 485 (5th Cir.), cert. denied, 419 U.S. 865 (1974) 29
United States v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984) 25
United States v. *Coleman*, 707 F.2d 374 (9th Cir.), cert. denied, 464 U.S. 854 (1983) 12
United States v. *DeFiore*, 720 F.2d 757 (2d Cir. 1983), cert. denied, 466 U.S. 906 (1984) 14, 26
United States v. *Figueroa*, 818 F.2d 1020 (1st Cir. 1987) 11
United States v. *Ford*, 824 F.2d 1430 (5th Cir. 1987), cert. denied, 484 U.S. 1034 (1988) 14
United States v. *Ford*, 811 F.2d 268 (5th Cir. 1987) 26
United States v. *Frady*, 456 U.S. 152 (1982) 10, 14
United States v. *Gagnon*, 470 U.S. 522 (1985) 11
United States v. *Kirkland*, 637 F.2d 654 (9th Cir. 1980) 29
United States v. *Liquori*, 438 F.2d 663 (2d Cir. 1971) 25

Cases—Continued: Page

United States v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989) (withdrawn), reh'g granted (Feb. 9, 1990) 6, 14, 15, 26
United States v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990) 6
United States v. *Musacchia*, 900 F.2d 493 (2d Cir. 1990) 14, 20
United States v. *Peacock*, 761 F.2d 1313 (9th Cir.), cert. denied, 474 U.S. 847 (1985) 5, 25
United States v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983) 14, 26
United States v. *Rodgers*, 466 U.S. 475 (1984) 19, 26
United States v. *Silverstein*, 732 F.2d 1338 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985) 17
United States v. *Smith*, 490 F.2d 789 (D.C. Cir. 1974) 12
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 10
United States v. *Surridge*, 687 F.2d 250 (8th Cir.), cert. denied, 459 U.S. 1044 (1982) 12
United States v. *Thame*, 846 F.2d 200 (3d Cir.), cert. denied, 488 U.S. 928 (1988) 17
United States v. *Vanwort*, 887 F.2d 375 (2d Cir. 1989), cert. denied, 110 S. Ct. 1936 (1990) 6
United States v. *Wey*, 895 F.2d 429 (7th Cir. 1990) 6, 14, 19, 20
United States v. *Woodner*, 317 F.2d 649 (2d Cir.), cert. denied, 375 U.S. 903 (1963) 29
United States v. *Young*, 470 U.S. 1 (1985) 14
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 16
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 11, 13, 24
Wainwright v. *Witt*, 469 U.S. 412 (1985) 29
Yakus v. *United States*, 321 U.S. 414 (1944) 10
Young v. *Vuitton et Fils S.A.*, 481 U.S. 787 (1987) 16
Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982) 20

Constitution, statutes and rules:	Page
U.S. Const.:	
Art. III	19, 21
Amend. IV	11, 12
Amend. V	12
Federal Magistrates Act, 28 U.S.C. 631 *et seq.*	9
28 U.S.C. 636(b)	21
28 U.S.C. 636(b)(3)	9
28 U.S.C. 636(c)	21
18 U.S.C. 113(c)	2
18 U.S.C. 113(f)	2
18 U.S.C. 924(c)	2, 4
18 U.S.C. 1001	19
18 U.S.C. 3401	21
Fed. R. Crim. P.:	
Rule 43(a)	11
Rule 51	2, 6, 10, 11, 13, 21, 24
Rule 52(a)	15
Rule 52(b)	2, 6, 14, 15, 21
Miscellaneous:	
3 W. LaFave & J. Israel, *Criminal Procedure* (1984)	12
Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 De Paul L. Rev. 753 (1980)	10-11
3A C. Wright, *Federal Practice and Procedure* (2d ed. 1982)	11

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1363

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 886 F.2d 223.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1989, and a petition for rehearing was denied on January 16, 1990. The petition for a writ of certiorari was filed on February 26, 1990, and was granted on April 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Federal Rule of Criminal Procedure 51 provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

Federal Rule of Criminal Procedure 52(b) provides:

> *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

After a jury trial in the United States District Court for the District of Hawaii, respondent was convicted of assault with a deadly weapon, in violation of 18 U.S.C. 113(c); assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(f); and use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c). She was sentenced to five years' imprisonment and three years' probation. J.A. 56-57.

1. On December 20, 1986, respondent became upset with her third husband, Neil, when he knocked over a Christmas tree during an argument in their house on a military reservation in Hawaii. Tr. 29, 44, 164-165. Neil left the house after the argument. Tr. 48. Later that day, respondent told a friend that she was angry with her husband and that she would shoot him if she could find a gun. Tr. 165. She had made similar remarks in the past. Tr. 221. Respondent was drinking beer at home with her friends when Neil returned. Neil was disturbed that respondent was drinking, so he took her beer from the refrigerator and moved it out into the yard. Respondent then chased Neil into the kitchen where they had a loud argument. Tr. 165-168.

After the fight, Neil left the house again. Respondent, carrying a gun, emerged from the house and told Neil that he should leave. Tr. 169-170, 316. Neil started to walk back toward the house, whereupon respondent shot and seriously wounded him. Tr. 196. Respondent then walked over to Neil and said in a normal tone of voice, "I told you I would do it." Tr. 211. When a military policeman arrived on the scene, respondent told him: "He threw the Christmas tree down and that made me mad, but he took my beer and that was the last straw." Tr. 352-353. Respondent admitted at trial that she had also fired a gun at her first husband, and that she had boasted of shooting at her second husband as well. Tr. 311, 328.

2. Prior to trial, in accordance with what was at that time the normal practice in the District of Hawaii, the district court assigned jury selection to a federal magistrate. Respondent did not object to that assignment, nor did she request that a district judge, rather than a magistrate, conduct the selection of the jury.

During voir dire, the magistrate sustained respondent's only objection to a proposed question submitted by the government. J.A. 47-48. In addition, the magistrate asked an additional question of the venire at respondent's request. J.A. 49. At the conclusion of

jury selection, the magistrate asked the parties: "For the record, would you like—is there any objection you'd like to make in the manner in which the jury was selected?" J.A. 54. Respondent's counsel replied: "No, your honor." *Ibid.* When the trial began the next day before a district judge, respondent did not object to the magistrate's supervision of jury selection or to any of the magistrate's rulings during that process. The jury found respondent guilty on all three counts described above.[1]

3. In her initial brief on appeal, respondent challenged only her firearms conviction under 18 U.S.C. 924(c). She did not raise any issue concerning the selection of the jury by the magistrate. While the appeal was pending, this Court decided *Gomez* v. *United States*, 109 S. Ct. 2237 (1989). In *Gomez*, the Court held that the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, does not authorize district courts to delegate jury selection in felony trials to magistrates, and that the selection of a jury by a magistrate is not harmless error if the defendant made a timely objection. In a motion filed in the court of appeals after the *Gomez* decision, respondent argued for the first time that the district court committed reversible error in delegating jury selection to a magistrate.

The court of appeals reversed respondent's convictions. The court first held that *Gomez* should be applied retroactively to all cases pending on direct appeal at the time it was decided. Pet. App. 7a-8a.[2] The court then held that respondent had not waived

[1] Count 1 of the indictment charged respondent with assault with the intent to commit murder. The jury found her guilty of the lesser-included offense of assault with a deadly weapon.

[2] We have not challenged the court of appeals' ruling on that point.

her right to raise the *Gomez* claim by her failure to object in the district court. The court reasoned that nothing in the *Gomez* opinion suggests that "the Court intended to limit the broad, definitive rule it announced" to cases, like *Gomez*, in which the defendant objected. *Id.* at 9a.

The court of appeals held that, in any event, no objection was necessary to preserve the claimed error because two previous decisions of the Ninth Circuit had held that magistrates may conduct voir dire in felony trials.[3] Pet. App. 9a-10a. Thus, according to the court, respondent faced a "solid wall of circuit authority" that "would have prevented the district court from correcting the alleged error." *Id.* at 10a. In the court's view, to require a defendant to object to "aspects of the trial that have already been approved by the court of appeals" would encourage "defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned." *Ibid.* (quoting *Guam* v. *Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc)).

The Ninth Circuit noted that the "solid wall of circuit authority" exception to the contemporaneous objection rule had been used in the past only to excuse a defendant's failure to object to a jury instruction. The court reasoned, however, that the rule announced in *Gomez* "touches on one of the most 'basic rights' of the accused, the right to a fair and accurate trial." Pet. App. 10a. Thus, the court concluded that it would be "at best unseemly, and at worst irresponsi-

[3] The two decisions were *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), cert. denied, 474 U.S. 847 (1985), and *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986).

ble, to penalize" respondent for failing to object to the selection of the jury in this case by a magistrate. *Ibid.*[4]

SUMMARY OF ARGUMENT

The Federal Rules of Criminal Procedure require a party to make known to the court the party's objection to the court's ruling at the time the ruling is made (Fed. R. Crim. P. 51); the Rules further provide that an error as to which no contemporaneous objection is made will be reviewed only if it satisfies the exacting standards of the "plain error" doctrine (Fed. R. Crim. P. 52(b)). The district court in this case delegated the task of jury selection to a magistrate, a course of action that the Court subsequently held improper in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989). Respondent, however, did not object to that delegation and in fact expressed satisfaction with the procedure by which the jury was selected. It was not until appeal that respondent argued that the district court should not have delegated jury selection to a magistrate. Because respondent failed to preserve

[4] All other circuits that have considered the matter have rejected claims based on *Gomez* in cases in which the defendant did not object. See *United States* v. *Wey*, 895 F.2d 429 (7th Cir. 1990); *United States* v. *Vanwort*, 887 F.2d 375 (2d Cir. 1989), cert. denied, 110 S. Ct. 1936 (1990); *United States* v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990); *Government of the Virgin Islands* v. *Williams*, 892 F.2d 305 (3d Cir. 1989). A panel of the First Circuit in *United States* v. *Lopez-Pena*, 890 F.2d 490 (1989) (withdrawn), reh'g granted (Feb. 9, 1990), held that delegating jury selection to a magistrate was not plain error that required reversal in the absence of an objection. On February 9, 1990, however, the First Circuit vacated the panel decision and set the case for argument before the entire court. The en banc court has not yet ruled.

her claim in the district court, the court of appeals should not have reversed her conviction.

None of the possible grounds for disregarding the contemporaneous objection rule is applicable in this case. First, the delegation of jury selection to a magistrate was not "plain error," since it did not result in a miscarriage of justice. The jury selection procedure was conducted fairly; the magistrate ruled in respondent's favor on the only disputed issues that arose in the course of jury selection; and respondent expressed satisfaction afterwards with the jury selection process.

Second, the fact that a magistrate does not have authority, or "jurisdiction," to conduct jury selection does not require automatic reversal in every case in which the jury was selected by the magistrate, if the defendant did not object to that procedure at the time. Of course, there are limits to the extent to which the parties may consent to deviations from the basic procedures for litigating criminal cases. But the delegation of a limited task in the course of a criminal trial to a judicial officer who has been designated by Congress to perform many judicial duties does not call into question the fairness, integrity, or public reputation of judicial proceedings. The delegation, even though error, should therefore not be cognizable in the absence of an objection by the defendant.

Third, respondent should not be excused from making a contemporaneous objection to the delegation of jury selection to a magistrate because of what she characterizes as a "solid wall of circuit authority" against her on the issue at the time of her trial. Nothing in the Federal Rules of Criminal Procedure or in this Court's cases suggests that adverse circuit

court precedent is enough to excuse a party from its obligation to make contemporaneous objections to rulings with which the party disagrees.

In any event, it is incorrect to characterize the Ninth Circuit cases permitting magistrate jury selection as a "wall of circuit authority" that rendered futile any objection by respondent to having the magistrate select the jury. The Ninth Circuit cases merely authorized the delegation of jury selection to magistrates; they did not require that it be done. Respondent therefore could have asked the district judge to conduct the jury selection, and nothing in the Ninth Circuit's decisions would have prevented the district judge from doing so.

Relieving defendants of the contemporaneous objection requirement is particularly unwise in this context, since defendants in particular cases may well prefer to have a magistrate, rather than the district judge, conduct jury selection. Defense counsel may, for example, view a particular magistrate as more flexible than the district judge or more favorably inclined to the defense in the matter of jury selection. To excuse the failure to object to the magistrate's role in jury selection therefore may permit the defendant to enjoy jury selection by the magistrate—the option he would have chosen if asked—and then obtain a reversal of his conviction by complaining for the first time on appeal that the magistrate should not have been permitted to select the jury.

ARGUMENT

RESPONDENT FORFEITED HER RIGHT TO HAVE A JUDGE PRESIDE OVER VOIR DIRE BECAUSE SHE DID NOT OBJECT TO THE MAGISTRATE'S ROLE IN SELECTING THE JURY

In *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), the defendants objected to the delegation of jury selection to a federal magistrate. The district court overruled that objection, and the Second Circuit affirmed. This Court granted certiorari to decide whether the assignment of jury selection to a magistrate "without the defendant's consent" violated the Federal Magistrates Act, 28 U.S.C. 631 *et seq.* See 109 S. Ct. at 2239. The Court held that presiding over jury selection at felony trials is not one of the "additional duties" that may be delegated to magistrates under 28 U.S.C. 636(b)(3). And the Court ruled that such a delegation, over "the defendant's objection," cannot be harmless error. 109 S. Ct. at 2248.

The issues litigated in *Gomez* were raised in the conventional manner. The defendants preserved their claim for appellate review by first raising it in the district court and then presenting it to the court of appeals. In this case, by contrast, it is conceded that respondent did not make any objection in the trial court to having the magistrate conduct jury selection. This case therefore presents the question whether the Ninth Circuit erred in disregarding the usual procedure for preserving issues and excusing respondent's failure to make any objection to having a magistrate conduct the selection of the jury.

A. The Contemporaneous Objection Rule Serves Important Purposes In Criminal Litigation

This Court has emphasized that "[n]o procedural principle is more familiar to [the] Court than that a * * * right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). Accord *United States* v. *Frady*, 456 U.S. 152, 162 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). The principle providing for the forfeiture of legal claims in the absence of a contemporaneous objection is embodied in Federal Rule of Criminal Procedure 51. That rule abolished the use of "exceptions" to preserve legal claims, but retained the requirement that a party make its objections and wishes known to the district court. An error is presented under the Rule only if the party "makes known to the court the action which that party desires the court to take or that party's objection to the action of the court." *Hill* v. *United States*, 261 F.2d 483, 489 (9th Cir. 1958).[5]

This Court has applied the contemporaneous objection rule in a variety of contexts.[6] For example, in

[5] Rule 51 excuses the lack of an objection if "a party has no opportunity to object to a ruling or order." In this case, of course, respondent's counsel was fully aware of the trial court's delegation of jury selection to a magistrate, and counsel was not in any way prohibited from making a timely objection to the procedure. Counsel therefore had ample "opportunity" to make an objection. Compare J.A. 54.

[6] Strictly speaking, Rule 51 sets forth a rule of forefeiture, not waiver, although the courts occasionally speak in terms of a defendant's "waiver" of a legal claim. See Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 De Paul L. Rev. 753, 757-758 (1980). The term "waiver" often connotes the intelligent and knowing relinquishment of a right. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The forfeiture principle in Rule 51, by contrast, does not depend on the defendant's state of mind when he failed to raise an issue in the trial court. See *United States* v. *Gagnon*, 470 U.S. 522, 527-528 (1985); *Wainwright* v. *Sykes*, 433 U.S. 72, 82-91 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 & n.3 (1976).

United States v. *Gagnon*, 470 U.S. 522 (1985), the district court held a conference in chambers outside the presence of the defendants. The defendants did not object, but on appeal they argued that the district court had violated their right under Federal Rule of Criminal Procedure 43(a) to be present at all stages of a criminal trial. This Court held that the defendants had forfeited their rights under Rule 43 because "[n]o objections of any sort were lodged." 470 U.S. at 528. Likewise, in *Levine* v. *United States*, 362 U.S. 610 (1960), the Court ruled that the defendant had forfeited any due process right to a public trial by not asking the district judge to open the courtroom. *Id.* at 619. See also *Segurola* v. *United States*, 275 U.S. 106, 111-112 (1927) (Fourth Amendment challenge to the seizure of evidence forfeited in the absence of a timely motion to suppress); 3A C. Wright, *Federal Practice and Procedure* § 842, at 287 (2d ed. 1982) (requirement that defendant object and express his preference applies "to all kinds of rulings at the trial").[7]

[7] The courts of appeals have consistently held that defendants forfeit statutory and constitutional rights if they fail to make an objection, unless the forfeiture results in a miscarriage of justice. See, *e.g.*, *United States* v. *Figueroa*, 818 F.2d 1020, 1025 (1st Cir. 1987) (forfeited *ex post facto* argument); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (11th

The reasons that a defendant must make his views known to the trial court are familiar ones. First, the requirement greatly promotes judicial economy. See *Wainwright* v. *Sykes*, 433 U.S. at 90; *United States* v. *Smith*, 490 F.2d 789, 794-795 (D.C. Cir. 1974); *United States* v. *Bamberger*, 456 F.2d 1119, 1131 (3d Cir. 1972), cert. denied, 413 U.S. 919 (1973); 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.5, at 251 (1984). If the issue is raised in the trial court, the trial judge may be able to resolve the matter to the defendant's satisfaction. See *United States* v. *Gagnon*, 470 U.S. at 529. Or the prosecutor might decide to forgo a particular course of conduct in order to eliminate the possibility of inserting a reversible error into the record. See generally *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *Wainwright* v. *Sykes*, 433 U.S. at 89. In either case, a contemporaneous objection would eliminate the need for an appellate reversal and a second trial on the same charges.

Second, the contemporaneous objection rule requires the parties to declare themselves as to the actions they want the court to take. As a matter of basic fairness, a defendant should not be able to pursue a certain course at trial for tactical reasons and, if convicted, later claim that the course followed by the court was reversible error. See 3 W. LaFave & J. Israel, *supra*, at 251; see also *Wainwright* v. *Sykes*, 433 U.S. at 89.

Cir. 1984) (forfeited double jeopardy defense), cert. denied, 472 U.S. 1017 (1985); *United States* v. *Coleman*, 707 F.2d 374, 376 (9th Cir.) (forfeited Fifth Amendment claim), cert. denied, 464 U.S. 854 (1983); *United States* v. *Surridge*, 687 F.2d 250, 255 (8th Cir.) (forfeited Fourth Amendment objection), cert. denied, 459 U.S. 1044 (1982).

This Court in *Wainwright* v. *Sykes* summarized the importance of the contemporaneous objection rule when it described a criminal trial:

> A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

433 U.S. at 90.

B. No Exception To The Contemporaneous Objection Rule Is Applicable To This Case

There are three possible arguments to support respondent's claim that she should be exempt from Rule 51. First, it can be argued that the delegation of jury selection to a magistrate constitutes "plain error" cognizable even in the absence of an objection. Second, it can be argued that this Court's decision in *Gomez* held that the delegation of jury selection to a magistrate is a jurisdictional error that cannot be forfeited by a failure to object. The third and narrowest argument, which the Ninth Circuit accepted in this case, is that respondent was not required to express her view regarding jury selection because an

objection would have been futile in light of prior circuit precedent. No court has adopted either of the first two arguments, and none of the three is persuasive.

a. The broadest argument for refusing to apply the contemporaneous objection rule in this case is that the assignment of jury selection to a magistrate constitutes "plain error" reviewable even in the absence of an objection under Fed. R. Crim. P. 52(b). In her brief in opposition to the petition for a writ of certiorari, respondent eschewed all reliance on the plain error doctrine. See Br. in. Opp. 14-16. That tactic is understandable, since every court that has addressed the plain error claim has rejected it.[8]

As this Court has noted, the plain error rule set forth in Fed. R. Crim. P. 52(b) is a narrow exception to the contemporaneous objection rule, one that "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). The plain error rule should be used "to correct only 'particularly egregious errors,' those that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citation omitted). To satisfy this standard, a reviewing court must "find that the claimed error not only seriously affected

[8] See *United States* v. *Musacchia*, 900 F.2d 493 (2d Cir. 1990); *United States* v. *Wey*, 895 F.2d 429 (7th Cir. 1990); *United States* v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989) (withdrawn), reh'g granted (Feb. 9, 1990); *United States* v. *Ford*, 824 F.2d 1430, 1438-1439 (5th Cir. 1987), cert. denied, 484 U.S. 1034 (1988); *United States* v. *DeFiore*, 720 F.2d 757, 764-765 (2d Cir. 1983), cert. denied, 466 U.S. 906 (1984); *United States* v. *Rivera-Sola*, 713 F.2d 866, 974 (1st Cir. 1983).

'substantial rights,' but that it had an unfair prejudicial impact" on the trial. *Id.* at 17 n.14. To show plain error, therefore, respondent had to establish not only that a fundamental error occurred at trial, but also that the error affected the result of her trial.

At no point has respondent suggested any way in which the magistrate's handling of the jury selection was inadequate. The magistrate ruled in respondent's favor on the only points respondent raised during jury selection, and at the conclusion of jury selection respondent's counsel expressed satisfaction with the way the process was handled. The delegation of jury selection to a magistrate in this case cannot be regarded as a "miscarriage of justice," because there is absolutely no basis in this record on which to conclude that the magistrate's performance had any adverse effect on the way the case was tried or the ultimate outcome of the trial. To the contrary, there is every reason to believe that respondent was satisfied with having the magistrate conduct the jury selection, both at the outset of that process and at its conclusion.

The Court in *Gomez* held that the delegation of jury selection to a magistrate can never be dismissed as harmless error, see Fed. R. Crim. P. 52(a). The Court's determination that a *Gomez* error can never be harmless within the meaning of Rule 52(a) does not, however, mean that such an error is always "plain" within the meaning of Rule 52(b).

The doctrines of harmless error and plain error protect different interests and are not simply "flip sides of the same coin." *United States* v. *Lopez-Pena*, 890 F.2d 490, 495 (1st Cir. 1989) (advance sheet edition; opinion withdrawn from bound volume), reh'g granted (Feb. 9, 1990). The harmless error rule protects rulings in criminal cases from attack on

inconsequential grounds and therefore ordinarily requires a reviewing court to find prejudice to the defendant before overturning the ruling in question. The plain error rule has the dual function of protecting the process of adjudication at trial by requiring the defendant to make her wishes known with respect to a particular ruling and at the same time protecting against the risk that a defendant will be unjustly convicted due to a serious default on the part of her attorney. Because of the different policies served by the two doctrines, an error that is nonharmless is not necessarily "plain." An error will be found to be harmless only if a reviewing court still has great confidence that the error did not materially affect the verdict. In order to rise to the level of plain error, however, an error must have a more demonstrable effect on the verdict, since concern for the fairness of the proceedings must be balanced against the strong policy interests requiring an assertion of error to be brought to the attention of the district court in time for the error to be avoided.

The Court has identified several classes of errors that are not subject to harmless error analysis.[9] But that does not mean that such an error must result in reversal even if the defendant fails to call it to the district court's attention. A ruling that harmless

[9] See, *e.g.*, *Young* v. *Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion) (appointment of a prosecutor with a financial interest in the outcome creates an appearance of impropriety and has effects on the prosecution that are difficult to assess); *Rose* v. *Clark*, 478 U.S. 570, 578 (1986) ("harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from the grand jury strikes at fundamental values of our society and does not lend itself to harmless error analysis).

error analysis is inapplicable to a particular error rests on the difficulty of assessing whether the practice at issue causes prejudice, not on the conclusion that the practice results in prejudice to the defendant in every case. See *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). Thus, the Court's decision in *Gomez* that harmless error analysis does not apply when a magistrate picks a jury does not mean that respondent was prejudiced by the magistrate's role at her trial. By contrast, the plain error standard requires a showing of substantial prejudice, which respondent cannot make.[10]

The distinction between harmless error and plain error analysis is clearest with respect to errors that have the potential to be highly prejudicial, but which the defendant, in particular settings, may wish to let pass, or even welcome. An erroneous ruling cannot be considered plain error where the defendant may have good reason not to resist it.

Two examples illustrate this point. The Court has stated that the introduction of a coerced confession cannot be harmless error. See *Bram* v. *United States*, 168 U.S. 532, 541-543 (1897); *Rose* v. *Clark*, 478 U.S. 570, 577, 578 n.6 (1986); *Chapman* v. *Califor-*

[10] The courts of appeals that have considered the relationship between the harmless error and plain error standards have suggested that a finding of plain error ordinarily requires a greater showing of prejudice than is necessary to avoid a finding of harmless error. See *United States* v. *Thame*, 846 F.2d 200, 207 (3d Cir.), cert. denied, 488 U.S. 928 (1988); *United States* v. *Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985). That is particularly so with respect to constitutional errors, which cannot be excused under the harmless error doctrine unless the errors are harmless beyond a reasonable doubt.

nia, 386 U.S. 18, 23 & n.8 (1967).[11] But that is not to say that the introduction of a coerced confession is necessarily plain error. The defendant may not be strongly opposed to having the confession admitted, or he may even have tactical reasons for wanting the confession before the jury—for example, to show the jury that the police badgered him during the course of the investigation. Or, the defendant may believe that in light of the strength of the prosecution's case against him, suppression of the confession would do him no good, and he may consider it more fruitful to plant a potential basis for reversal in the case by allowing the confession to be admitted and objecting on appeal to its admission.

Similarly, in *Turner* v. *Murray*, 476 U.S. 28 (1986), the Court adopted a per se rule that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The Court's rule apparently would not allow a finding of harmless error in any case in which the defendant requested the inquiry. Because it recognized that defense counsel might prefer not to broach the subject of racial prejudice, however, the Court held that the defendant would be entitled to the inquiry only upon request. 476 U.S. at 37 & n.10. Thus, omission of the inquiry upon request could not be harmless error; if the defendant made no request, however, the omission would not constitute plain error.

In this case, by analogy, the fact that harmless error principles do not apply to a *Gomez* error d s

[11] The correctness of that principle is one of the issues presented in *Arizona* v. *Fulminante*, No. 89-839, cert. granted (Mar. 26, 1990).

not mean that respondent should be free to raise such an error on appeal without having preserved an objection in the district court. As in the examples cited above, respondent may have preferred the procedure employed at trial or may have been indifferent to whether the magistrate or the trial judge presided over jury selection. Respondent's late-blooming objection to the procedure may simply be the product of her disappointment that she was subsequently convicted and her search for some ground on which to obtain a new trial.

b. A second, related argument for reversal is that the error of delegating jury selection to a magistrate is a "jurisdictional error" that may not be forfeited or waived. The Court in *Gomez* characterized the delegation of jury selection to a magistrate as an error relating to "jurisdiction." That is, the Court based its holding on "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." 109 S. Ct. at 2248. In light of that language, the argument has been made, albeit never successfully, that *Gomez* does not permit waiver or forfeiture of the right to jury selection by an Article III judge. That contention misreads the Court's opinion in *Gomez*.

The word "jurisdiction" is "a many-hued term." *United States* v. *Wey*, 895 F.2d 429, 431 (7th Cir. 1990). As the Seventh Circuit noted in *Wey*, "*Gomez* uses the word 'jurisdiction' in a context revealing that the Court meant 'authority.'" *Id.* at 431. That is, the district court had no authority under the Magistrates Act to refer jury selection to a magistrate. See also *United States* v. *Rodgers*, 466 U.S. 475, 479-480 (1984) (defining "jurisdiction" in 18 U.S.C. 1001 to mean "official, authorized functions"); cf.

Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982) (holding that time limit for filing Title VII claims could be waived or tolled even though Court had earlier termed the requirement "jurisdictional").[12]

Although the magistrate did not have authority, or "jurisdiction," to conduct jury selection, that "jurisdictional" flaw likewise does not require reversal in the absence of an objection. There are, of course, limits to the extent to which a court may delegate criminal trial functions to unauthorized persons. Even if it were done with the consent of the parties, a court's delegating to a panel of citizens the task of ruling on objections, instructing the jury, and imposing sentence would be plain error, since such a flagrant departure from traditional procedures would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). But magistrates are judicial officers who perform a variety of functions in aid of Article III judges, including, with the consent of the parties, conducting civil and misdemeanor criminal trials. See 18 U.S.C. 3401; 28 U.S.C. 636(b) and (c). While we now know that magistrates are not authorized to conduct felony jury selection, that degree of participation by a magistrate in felony trials is not so incongruous or inconsistent with our shared notions of procedural regularity as to undermine the integrity and public reputation of the federal criminal courts. The "jurisdictional" flaw in the delegation of jury selection to a federal magistrate is therefore not plain error, and does not render the ultimate judgment voidable absent an objection from the defendant.

[12] The district court, of course, did not lose subject matter jurisdiction over this case simply because it erroneously delegated jury selection to a magistrate. Subject matter jurisdiction is lacking when the court cannot issue a binding judgment on the subject. There is no doubt that the court had jurisdiction to enter a judgment of conviction, which incorporated respondent's sentence. Whether the district judge or federal magistrate presided "during jury selection does not affect the court's subject-matter jurisdiction, for it has nothing to do with whether the tribunal may enter a judgment conclusively resolving this dispute." *United States* v. *Wey*, 895 F.2d at 431. Accord *United States* v. *Musacchia*, 900 F.2d 493 (2d Cir. 1990); see generally *CFTC* v. *Schor*, 478 U.S. 833, 848 (1986) ("Article III's guarantee of an impartial and independent federal adjudication is subject to waiver."). Accordingly, the trial court's error in delegating jury selection to a magistrate was not a "jurisdictional" error of the sort that may be raised at any time (or noted by the court *sua sponte*) and requires reversal of the judgment whenever it is noticed.

c. The third argument for reversal—the alleged futility of objecting to magistrate jury selection—is the one on which respondent and the Ninth Circuit principally rely. The Ninth Circuit held that respondent was not required to express her desire to have a district judge preside at voir dire because, in the court's view, there was a " 'solid wall of circuit authority' which would have prevented the district court from correcting the alleged error." Pet. App. 10a (quoting *Guam* v. *Yang*, 850 F.2d at 512 n.8).

Nothing in the Federal Rules of Criminal Procedure or the decisions of this Court suggests that "a solid wall of circuit authority" constitutes an exception to the requirement that an issue be raised in the district court in order to be preserved for review. Rule 51 does not contain such an exception, and Rule 52(b) provides only one exception to the requirement of contemporaneous objection—the exception for

"[p]lain errors or defects affecting substantial rights."

In the analogous context of an action for habeas corpus relief from a state criminal conviction, this Court has held that contrary and binding state authority is not sufficient cause for a defendant's failure to present a constitutional objection to a state court. See *Engle* v. *Isaac*, 456 U.S. 107 (1982). In holding that the failure to object precluded federal habeas corpus review, the Court stated: "[T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Id.* at 130. As the Court explained, "[i]f a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." *Ibid.* See also *Estelle* v. *Williams*, 425 U.S. 501, 515 (1976) (Powell, J., concurring) (defense counsel should not be allowed "deliberately to forgo objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile").

To be sure, the Court has held that if a legal issue is sufficiently "novel" at the time of the defendant's trial, the novelty of the issue may constitute sufficient cause for his lawyer's failure to raise the issue and therefore justify the habeas court in overlooking the failure to comply with the State's contemporaneous objection rule. *Reed* v. *Ross*, 468 U.S. 1 (1984). The Court has distinguished, however, between issues that are "novel" and those as to which defense counsel regards an objection as "futile." See *Engle* v. *Isaac*, 456 U.S. at 130-131. As the Court has explained, in order to satisfy the "novelty" requirement, the claim must be one as to which counsel has "no reasonable

basis upon which to formulate" a legal objection. *Reed* v. *Ross*, 468 U.S. at 14-15.

The Court in *Reed* v. *Ross* identified three circumstances in which a claim might be regarded as sufficiently novel to excuse the failure of counsel to raise it: where the claim is foreclosed by a decision of this Court, which must be explicitly overruled in order for the claim to succeed; where the claim is contrary to "a longstanding and widespread practice to which [the] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved"; and where the claim challenges a practice this Court has sanctioned in prior cases. 468 U.S. at 17.

On occasion, this Court has excused the failure to raise a legal issue on direct appeal in a federal criminal case, where the issue in question is "novel" in the sense that the Court used the term in *Reed* v. *Ross*. Thus, the Court held in *Grosso* v. *United States*, 390 U.S. 62, 70-71 (1968), that in light of prior decisions of the Court, the defendant's failure to raise a constitutional objection to certain counts in the indictment against him would not be regarded as a waiver of his privilege against compulsory self-incrimination with respect to the charges in those counts. Similarly, in *Westover* v. *United States*, one of the cases decided together with *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court held that counsel's failure to argue that the warnings set forth in the *Miranda* case should have been given did not result in a forfeiture of that claim. 384 U.S. at 495 n.69. The Court apparently based that conclusion on the novelty of the issue decided in *Miranda*, and the fact that the defendant's trial had occurred even prior

to the Court's earlier, related decision in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).[13]

Thus, while the novelty of a legal issue may excuse the failure to raise the issue below in certain narrowly defined circumstances, this Court has never recognized a general "futility" exception to the contemporaneous objection rule. And the Court's decisions provide no support for the Ninth Circuit's rule that an objection need not be raised at trial simply because the court of appeals has unfavorable law on the issue. In any event, even if the Court were prepared to recognize some form of "futility" exception, this case would not fall within it.

Even the Ninth Circuit has characterized the "futility" exception as "very narrow." *Guam* v. *Yang*, 850 F.2d at 512 n.8. As conceived by the Ninth Circuit, the exception applies only in a case where an objection would be pure ritual—*i.e.*, where the district judge is bound by precedent in his circuit to follow a prescribed course of action. In such a case, none of the reasons underlying Rule 51 would apply, because the defendant would not be in a position to make a tactical choice (there would be only one available option) and the trial court would not be free to correct any alleged error (it would be bound by higher authority). Thus, the courts of appeals that

[13] In neither case did the Court discuss at length the reason it found the claims to be cognizable even though not raised below. In both cases, however, in addition to finding that the issues were novel, the Court used language suggesting that it regarded forfeiture of claims to require a deliberate decision to waive them. In subsequent decisions, the Court has made clear that that is not the governing standard for determining whether a defendant has forfeited procedural rights at trial. See *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, *supra*; *United States* v. *Broce*, 109 S. Ct. 757, 764 (1989).

have excused the failure to object on the ground of a "solid wall of circuit authority" have done so in cases in which the trial court's action was compelled by binding precedent from higher courts, *i.e.*, when the trial court had no authority or discretion to take any contrary or different action. See, *e.g.*, *United States*, v. *Liquori*, 438 F.2d 663, 665 (2d Cir. 1971); *Martone* v. *United States*, 435 F.2d 609, 610-611 (1st Cir. 1970). Indeed, the Ninth Circuit itself recognized as much in *Guam* v. *Yang*, *supra*, when it stated that this "narrow exception only applies * * * when a wall of binding authority squarely precludes the trial court from correcting an error." 850 F.2d at 512 n.8.[14]

The district court's action in this case was not mandated by binding circuit precedent. In *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), cert. denied, 474 U.S. 847 (1985), and *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986), the Ninth Circuit held that the Federal Magistrates Act vested district courts with discretion to delegate jury selection to magistrates. Nothing in those decisions hinted that district judges were required to—or even should—make such a delegation. Thus, there was no "solid wall of cir-

[14] Respondent relies on *United States* v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984), for the proposition that an objection is not required if the lawyer could have thought that one would be futile. In *Byers*, however, the defendant *did* object to the introduction of certain evidence that was the subject of the appeal. See *id.* at 1108. The defendant simply did not present to the district court the precise constitutional claim that he first raised on appeal. *Byers*, therefore, has nothing to do with a case such as this one, in which the defendant voiced no objection to the conduct on which he later premised his argument for reversal.

cuit authority" preventing the district court from conducting jury selection at respondent's trial if respondent had requested it. See *United States* v. *Lopez-Pena*, 890 F.2d at 497 (advance sheet edition) ("Even in circuits where the courts of appeals had *authorized* the practice of having magistrates preside at empanelment, no court of appeals had *insisted* that the practice be followed. * * * In that sense, then, district courts were never duty-bound in the punctilious observance of circuit precedent to reject objections to the magistrate's participation."). Indeed, prior to *Gomez* there were examples where a district judge in Hawaii had granted a defendant's request that the judge conduct voir dire. See 87-1282 Gov't C.A. Supp. Br. 6 (referring to *United States* v. *Rewald*, Cr. 84-02417).[15] Accordingly, Rule 51 required respondent to "make[] known to the court the action" that she desired in order to preserve for appellate review her claim that the district judge should have presided over jury selection.[16]

---

[15] There are similar examples from other districts in which magistrates ordinarily conducted voir dire. The panel in *United States* v. *Lopez-Pena*, 890 F.2d at 497 (advance sheet edition), described such a case in the District of Rhode Island.

[16] At the time of respondent's trial, only the Ninth Circuit had squarely rejected the claim that jury selection could not be delegated to a magistrate. The First and Second Circuits had held that delegation to a magistrate did not constitute plain error, see *United States* v. *DeFiore*, *supra*; *United States* v. *Rivera-Sola*, *supra*. The only other court to rule on the merits of the delegation question had granted rehearing en banc to consider the issue. *United States* v. *Ford*, 811 F.2d 268 (5th Cir. 1987). Thus, at the time of respondent's trial, the "wall" of authority consisted of only two bricks—the two Ninth Circuit decisions—and there was reason to believe that the "wall" would soon give way to a circuit conflict, as it later did. Cf. *United States* v. *Rodgers*, 466 U.S. at 484.

We recognize that the contemporaneous objection rule requires a lawyer to raise an issue even when he knows that the court will likely overrule his objection or reject his preference. For example, if a particular district judge has ruled on a specific matter in a prior case, it is unlikely that a lawyer will convince the judge to change his mind in the present case. And if a judge adopts a particular procedure on his own motion, an advocate will often face an uphill struggle in convincing the judge to change his mind. Even in such cases, however, a contemporaneous objection serves the purposes of: (1) allowing the parties and the court an opportunity to reach a compromise that satisfies the defendant; (2) enabling the appellate court to know that the defendant was aggrieved by a particular court action; and (3) ensuring that the defendant wanted a particular ruling at trial rather than simply seeking to hold back a potential claim for appeal.[17] See generally *Engle* v. *Isaac*, 456 U.S. at 130 ("Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid."); *Myers* v. *Washington*, 646 F.2d 355, 364 (9th Cir. 1981) (Poole, J., dissenting) (futility requires more than that a claim was "unacceptable to that particular court at that particular time").

---

[17] Respondent suggested in her brief in opposition (at 11) that a defense lawyer would lose credibility by making a difficult objection before the district court. We disagree. Trial courts are very familiar with the need to make a record for appellate review. Thus, a lawyer should seldom have any difficulty preserving a legal issue for appeal without offending a district judge. A lawyer will lose credibility only if he refuses to acknowledge that his claim is contrary to current law or custom.

The reasons underlying the rule requiring a litigant to make his preferences known to the trial court are fully applicable in this case. Unlike the admission of incriminating evidence, which in most cases is unfavorable to the defendant, jury selection by a magistrate may well give the defendant an advantage. Defense counsel might believe that the magistrate's view of qualified jurors is more favorable to the defendant than the district judge's view. Counsel might well conclude that a magistrate would be likely to conduct a more thorough voir dire than a district judge, who might be distracted by other matters. Counsel might conclude that the magistrate would be more amenable to the urging of counsel to ask particular questions of the prospective jurors or to permit counsel to play a greater role in the voir dire proceedings. Or, counsel might believe that the magistrate would be more willing than the district judge to grant for-cause challenges to prospective jurors. The case of assigning jury selection to a magistrate is therefore a much less compelling one for relieving defense counsel of the obligation to protest the procedure, since counsel may rationally prefer to have the magistrate select the jury. To relieve counsel of the obligation to object or waive the point allows the defendant to have the best of both worlds: the procedure the defendant prefers at the trial court level, and a winning argument on appeal if the case turns out badly.

In this case, there are good reasons to believe that the defendant was quite happy to have the magistrate preside at voir dire. The magistrate sustained defense counsel's objection to a question proposed by the government, and the magistrate asked an additional question of the venire at respondent's request. And

upon being asked directly if he had any objections to the jury selection procedure, defense counsel said that he did not. At the very least, "[t]he failure to object [likely] indicates that defense counsel felt that the trial error was not critical to his client's case," *Engle* v. *Isaac*, 456 U.S. at 136 n.1 (Stevens, J., concurring in part and dissenting in part), and was not likely to be prejudicial, *Lowenfield* v. *Phelps*, 484 U.S. 231, 240 (1988); *Wainwright* v. *Witt*, 469 U.S. 412, 430-431 & n.11 (1985). On a record such as this one, an attorney should not be permitted to remain silent, proceed with jury selection before a magistrate who makes several rulings favorable to the defense, and then on appeal claim for the first time that the district court erred in not conducting voir dire itself.

In sum, if respondent had wanted the district court to conduct voir dire, she should have said so. Because she did not, this case is exactly like many other cases in which the defendant, by failing to object, forfeited the right to claim on appeal that the district court erred in employing a particular discretionary procedure. See, *e.g.*, *United States* v. *Kirkland*, 637 F.2d 654 (9th Cir. 1980) (defendant could not question joinder where he did not move for severance); *United States* v. *Brown*, 493 F.2d 485 (5th Cir.) (defendant did not object to dispersal of jury after final argument), cert. denied, 419 U.S. 865 (1974); *United States* v. *Woodner*, 317 F.2d 649 (2d Cir.) (defendant failed to object to manner in which juror's hardship excuses were granted), cert. denied, 375 U.S. 903 (1963). As in those cases, respondent's silence in the district court should bar her from obtaining reversal of her conviction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

BRIAN J. MARTIN
Assistant to the Solicitor General

J. DOUGLAS WILSON
Attorney

JUNE 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 935

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS AND PROCEDURE	1
1. Facts At Trial	1
2. Procedure Pertaining To Jury Selection And The Appeal	3
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. THE CONTEMPORANEOUS OBJECTION RULE DOES NOT BAR RELIEF BECAUSE OBJECTION WOULD HAVE BEEN FUTILE IN LIGHT OF THE ENTRENCHED DISTRICT COURT PRACTICE AND A SOLID WALL OF NINTH CIRCUIT AUTHORITY SUSTAINING THAT PRACTICE	9
A. The Contemporaneous Objection Rule Does Not Preclude Relief Where Objection Would Have Been Futile Under Controlling Circuit Authority	9
B. Any Objection At Respondent's Trial Would Have Been Futile In Light Of The Firmly Entrenched Hawaii Practice	16
C. This Court Should Defer To The Court Of Appeals' Assessment Of The Effect Of Its Precedent And Of The Local Practice	21
D. The Habeas Corpus Doctrine Of Futility Is Inapplicable Here Because There Are No State-Federal Comity Concerns	21
E. Strong Policy Reasons of Judicial Economy And Fairness To The Accused Support The Decision Below	22
II. EVEN IF OBJECTION WAS NOT FUTILE, THE CONTEMPORANEOUS OBJECTION RULE DOES NOT APPLY HERE BECAUSE THE ERROR WAS JURISDICTIONAL AND NOT SUBJECT TO WAIVER	27
A. The Magistrate Had No Statutory Jurisdiction To Select The Jury In This Felony Case, And The Defect Was Not Waivable	27
B. Respondent Was Deprived Of Her Non-Waivable Right To Have An Article III Judge Preside At Jury Selection	31

Table of Contents Continued

Page

III. THE CONTEMPORANEOUS OBJECTION RULE DOES NOT APPLY HERE BECAUSE THE ERROR WAS "PLAIN" 36

IV. COUNSEL'S FAILURE TO OBJECT DID NOT CONSTITUTE RESPONDENT'S KNOWING AND EXPRESS CONSENT TO WAIVE HER BASIC RIGHT TO HAVE HER JURY SELECTED BY AN ARTICLE III JUDGE 39

A. The Reasoning Of *Gomez* And The Intent Of Congress Require Respondent's Knowing And Express Consent As A Prerequisite To A Valid Waiver 39

B. Because A Constitutional Or Fundamental Right Is At Issue, Personal Consent Is Required 44

CONCLUSION 47

TABLE AUTHORITIES

Case — Page

Adams v. *Heckler*, 794 F.2d 303 (7th Cir. 1986) 42

Adams v. *United States*, 317 U.S. 269 (1942) 44, 45

Agee v. *Lofton*, 287 F.2d 709 (8th Cir. 1961) 26

Ambrose v. *Welch*, 729 F.2d 1084 (6th Cir. 1984) 43

Angelet v. *Fay*, 333 F.2d 12 (2d Cir. 1964), *aff'd*, 381 U.S. 654 (1965) 13, 15

Archie v. *Christian*, 808 F.2d 1132 (5th Cir. 1987) 29

Argentine Republic v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989) 27

Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 41

Barker v. *Wingo*, 407 U.S. 514 (1972) 44

Bender v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986) 27, 28

Boag v. *MacDougall*, 454 U.S. 364 (1982) 3, 36

Bowsher v. *Synar*, 478 U.S. 714 (1986) 33

Boykin v. *Alabama*, 395 U.S. 238 (1969) 44

Brewer v. *Williams*, 430 U.S. 387 (1977) 45

Burnham v. *Superior Court of California*, 110 S. Ct. 2105 (1990) 29

Butler v. *McKellar*, 110 S. Ct. 1212 (1990) 25

California v. *LaRue*, 409 U.S. 109 (1972) 27

Callanan v. *United States*, 881 F.2d 229 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1816 (1990) 13, 20, 23

Capital Traction Co. v. *Hof*, 174 U.S. 1 (1899) 32

Carnley v. *Cochran*, 369 U.S. 506 (1962) 41, 44

Castille v. *Peoples*, 109 S. Ct. 1056 (1989) 13

Chapman v. *California*, 386 U.S. 18 (1967) 45

Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) ..... *passim*

Crowell v. *Benson*, 285 U.S. 22 (1932) 32, 44

Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 28

Douglas v. *Alabama*, 380 U.S. 415 (1965) 12, 19

Ehrlichman v. *Sirica*, 419 U.S. 1310 (1974) 21

Engle v. *Isaac*, 456 U.S. 107 (1982) 21, 22, 24

Estelle v. *Smith*, 451 U.S. 454 (1981) 13

Estelle v. *Williams*, 425 U.S. 501 (1976) 20

Faretta v. *California*, 422 U.S. 806 (1975) 45

Fowler v. *Jones*, 899 F.2d 1088 (11th Cir. 1990) 43

Table of Authorities Continued

Page

Geaney v. *Carlson*, 776 F.2d 140 (7th Cir. 1985)..... 43
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962)..... 31, 34
Government of the Virgin Islands v. *Williams*, 892 F.2d 305 (3d Cir. 1989), *cert. denied*,110 S. Ct. 2211 (1990) 28
Griffin v. United States, 336 U.S. 704 (1949) 18
Grosso v. *United States*, 390 U.S. 62 (1968)..... 10, 11, 12
Guam v. *Ibanez*, 880 F.2d 108 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 2631 (1990) 15
Guam v. *Yang*, 850 F.2d 507 (9th Cir. 1988)..... 6, 13, 15
Henderson v. *Dep't of Public Safety*, 901 F.2d 1288 (5th Cir. 1990) 11
Henderson v. *United States*, 476 U.S. 321 (1986)..... 21
Henry v. *Mississippi*, 379 U.S. 443 (1965) 10
Hernandez v. *Beto*, 443 F.2d 634 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971) 19
Hopkinson v. *Shillinger*, 888 F.2d 1286 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 3256 (1990)..... 24
Hormel v. *Helvering*, 312 U.S. 552 (1941)..... 10, 11
In Re Becraft, 885 F.2d 547 (9th Cir. 1989) 26
In re Howell, 731 F.2d 624 (9th Cir.), *cert. denied*, 469 U.S. 933 (1984) 11
Ingber v. *Enzor*, 841 F.2d 450 (2d Cir. 1988)..... 13, 23, 24
INS v. *Chadha*, 462 U.S. 919 (1983)..... 33
Insurance Corp. of Ireland v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)..... 27, 28, 30
Irvin v. *Dowd*, 366 U.S. 717 (1961)..... 32
Johnson v. *Zerbst*, 304 U.S. 458 (1938)..... 30, 41, 45
Leary v. *United States*, 395 U.S. 6 (1969)..... 10
Lovelace v. *Dall*, 820 F.2d 223 (7th Cir. 1987)..... 42, 43
Marchetti v. *United States*, 390 U.S. 39 (1968)..... 12
Marshall v. *Jerrico Inc.*, 446 U.S. 238 (1980)..... 31, 34, 45
Martone v. *United States*, 435 F.2d 609 (1st Cir. 1970).. 15
Massachusetts v. *Westcott*, 431 U.S. 322 (1977)..... 3-4
Matter of Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990)..... 30
McClaughry v. *Deming*, 186 U.S. 49 (1902)..... 30
Michigan v. *Jackson*, 475 U.S. 625 (1986)..... 44
Murret v. *City of Kenner*, 894 F.2d 693 (5th Cir. 1990) .. 43
Northern Pipeline Construction v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)..... 31, 34

Table of Authorities Continued

Page

O'Connor v. *New Jersey*, 405 F.2d 632 (3d Cir.), *cert. denied*, *sub nom. Yeager* v. *O'Connor*, 395 U.S. 923 (1969) 14
Olympia Hotels Corp. v. *Johnson Wax*, slip. op. No. 89-2350 (July 20, 1990), 1990 WL 100325..... 36
On Lee v. *United States*, 343 U.S. 747 (1952)..... 11
Osborne v. *Ohio*, 110 S. Ct. 1691 (1990)..... 10, 12, 19
Pacemaker Diagnostic Clinic of America v. *Instromedix*, 725 F.2d 537 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984)..... 31, 44
Patton v. *United States*, 281 U.S. 276 (1930)..... 44
Pennsylvania v. *Ritchie*, 107 S. Ct. 989 (1987)..... 10
People v. *Ahmed*, 66 N.Y. 2d 307, 487 N.E.2d 984 (1985) 34
Peters v. *Kiff*, 407 U.S. 493 (1972)..... 29, 36
Pierce Packing Co. v. *John Morrell*, 633 F.2d 1362 (9th Cir. 1980) 24
Reed v. *Ross*, 468 U.S. 1 (1984)..... 10, 12, 19
Rocha v. *Great American Insurance Co.*, 850 F.2d 1095 (6th Cir. 1988)..... 31, 38
Rose v. *Clark*, 478 U.S. 570 (1986)..... 31, 35
Rose v. *Lundy*, 455 U.S. 509 (1982)..... 22
Ross v. *Reed*, 704 F.2d 705 (4th Cir. 1983), *aff'd*, 468 U.S. 1 (1984) 24
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973)..... 45
Singleton v. *Wulff*, 428 U.S. 106 (1976) 11
Smith v. *Estelle*, 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981) 13
Smith v. *Smith*, 454 F.2d 572 (5th Cir. 1971), *cert. denied*, 409 U.S. 885 (1972) 18
Snider v. *Peyton*, 356 F.2d 626 (4th Cir. 1966) 18
Staub v. *City of Baxley*, 355 U.S. 313 (1958)..... 10
Strickland v. *Washington*, 466 U.S. 668 (1984) 38
Taylor v. *Illinois*, 484 U.S. 400 (1988) 46
United States ex rel. Toth v. *Quarles*, 350 U.S. 11 (1955) 32
United States v. *Baron*, 721 F. Supp. 259 (D. Haw. 1989) 18
United States v. *Bernhardt*, 840 F.2d 1441 (9th Cir.), *cert. denied*, 109 S. Ct. 389 (1988) 26
United States v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986)..... 4, 16, 20

Table of Authorities Continued

Page

United States v. *Byers*, 730 F.2d 568 (9th Cir.), *cert. denied*, 469 U.S. 934 (1984) 41, 42

United States v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984) 14, 19, 25

United States v. *Clark*, 475 F.2d 240 (2d Cir. 1973) 20

United States v. *Costello*, 352 F.2d 848 (2d Cir. 1965) *rev'd sub nom. Marchetti* v. *United States*, 390 U.S. 39 (1968) 12

United States v. *DeFiore*, 720 F.2d 757 (1983), *cert. denied*,467 U.S. 1241 (1984) 16

United States v. *Dobey*, 751 F.2d 1140 (10th Cir.), *cert. denied*, 474 U.S. 818 (1985) 42, 46

United States v. *Ferguson*, 778 F.2d 1017 (4th Cir. 1985), *cert. denied*, 476 U.S. 1123 (1986) 42

United States v. *Ford*, 797 F.2d 1329 (5th Cir. 1986), *cert. denied*, 474 U.S. 1070 (1987) 16

United States v. *Ford*, 824 F.2d 1430 (5th Cir. 1987) (*en banc*), *cert. denied*, 484 U.S. 1034 (1988) 37

United States v. *Frady*, 456 U.S. 152 (1982) 21, 38

United States v. *Garcia*, 848 F.2d 1324 (2d Cor. 1988), *rev'd sub nom. United States* v. *Gomez*, 109 S.Ct. 2237 (1989) 16, 36

United States v. *Grant*, 489 F.2d 27 (8th Cir. 1973) 15

United States v. *Hayden*, 860 F.2d 1483 (9th Cir. 1988) . 26

United States v. *Gomez*, 109 S. Ct. 2237 (1989) ..... *passim*

United States v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966) 13, 15

United States v. *La Guardia*, 902 F.2d 1010 (1st Cir. 1990) 11

United States v. *Lanham*, 416 F.2d 1140 (5th Cir. 1969). 31

United States v. *Leon*, 468 U.S. 897 (1984) 25

United States v. *Liguori*, 438 F.2d 663 (2d Cir. 1971) .. 13, 15

United States v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989), Lexis 17515, (withdrawn), *reh'g granted* (Feb. 9, 1990) 15, 16, 17, 28, 37

United States v. *Lovett*, 328 U.S. 303 (1946) 34

United States v. *Lyons*, 898 F.2d 210 (1st Cir.), *petition for cert. filed*, July 20, 1990 45

United States v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1140 (1990) 28

Table of Authorities Continued

Page

United States v. *Marcyes*, 557 F.2d 1361 (9th Cir. 1977). 46

United States v. *Miller*, 468 F.2d 1041 (4th Cir. 1972), *cert. denied* 410 U.S. 935 (1973) 37, 46

United States v. *Miller*, 636 F.2d 850 (1st Cir. 1980) 26

United States v. *Mortensen*, 860 F.2d 948 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1935 (1989) 4

United States v. *Mulder*, 889 F.2d 239 (9th Cir. 1989) ... 13

United States v. *Musacchia*, 900 F.2d 493 (2d Cir. 1990). 15, 25

United States v. *New York Telephone*, 434 U.S. 159 (1977) 36

United States v. *Peacock*, 761 F.2d 1313 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985) 4, 16, 20

United States v. *Raddatz*, 447 U.S. 667 (1980) 32

United States v. *Rivera*, 513 F.2d 519 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975) 15, 19, 20

United States v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983) 16

United States v. *Robinson*, 495 F.2d 30 (4th Cir. 1974) .. 42

United States v. *Sayeedi*, 903 F.2d 88 (2d Cir. 1990) 17

United States v. *Scott*, 425 F.2d 55 (9th Cir. 1970) (en banc) 15, 23

United States v. *Trice*, 864 F.2d 1421 (8th Cir. 1988), *cert. dismissed*, 109 S. Ct. 3206 (1989) 36

United States v. *Walters*, 638 F.2d 947 (6th Cir. 1981) ... 26

United States v. *Wey*, 895 F.2d 429 (7th Cir.), *cert. denied*, 110 S. Ct. 3283 (1990) 30

United States v. *Young*, 470 U.S. 1 (1985) 36, 38

Vasquez v. *Hillery*, 474 U.S. 254 (1986) 38

Ward v. *Village of Monroeville*, 409 U.S. 57 (1972) 30, 45

Wheat v. *United States*, 486 U.S. 153 (1988) 34

Yeager v. *O'Connor*, 395 U.S. 923 (1969) 14

Young v. *Vuitton et Fils S.A.*, 481 U.S. 787 (1987) 38

STATUTES & CONSTITUTIONAL PROVISIONS:

U.S. CONST. AMEND. VI 32

U.S. CONST. ART. III, § 1 9

U.S. CONST. ART. III, § 2, cl. 3 ..... 9, 32

18 U.S.C. § 113(a) 2

18 U.S.C. § 113(c) 2

18 U.S.C. § 113(f) 2

18 U.S.C. § 924(c) 2, 35

18 U.S.C. § 3401(b) 37, 40

Table of Authorities Continued

	Page
28 U.S.C. § 636(c)	42
28 U.S.C. § 636(c)(1)	42
28 U.S.C. § 636(c)(2)	42
28 U.S.C. § 636(c)(5)	42
28 U.S.C. § 2106	11
Fed. R. Crim. P. 2	10, 24
Fed. R. Crim. P. 12(b)(2)	27
Fed. R. Crim. P. 23(a)	44
Fed. R. Crim. P. 51	6, 22
OTHER AUTHORITIES	
4 W. Blackstone, *Commentaries on the Laws of England*, (Legal Classics Library, 1983 reprint of 1769 ed.)	33
3 W. LaFave & J. Israel, *Criminal Procedure* (1984)	14
3A C. Wright, *Federal Practice and Procedure* (1982)	14
W. Shakespeare, *The Merchant of Venice*	3
LEGISLATIVE MATERIALS	
114 Cong. Rec. H27342 (Sept. 18, 1968)	40
Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 109 (1966)	35
Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 2d Sess. 73 (1968)	41
H.R. Rep. No. 96-287, 96th Cong., 1st Sess. 18	41
H.R. Conf. Rep. No. 96-444, 96th Cong., 1st Sess. 8, *reprinted in* 1979 U.S. Code Cong. & Adm. News 1489	42
H.R. Conf. Rep. No. 1629, July 3, 1968, *reprinted in* 1968 U.S. Code Cong. & Admin. News 4264	42
S. Rep. No. 74 at 4, *reprinted in* 1979 U.S. Code Cong. & Admin. News 1472	43

STATEMENT OF FACTS AND PROCEDURE

1. The Facts At Trial

The government's statement of facts is incomplete insofar as it suggests that the evidence was overwhelming that respondent was guilty of intentionally shooting her husband without legal justification.[1] In fact, however, as found by the Court of Appeals, the evidence leads to "starkly disparate" conclusions. J.A. 2a. Therefore, respondent summarizes the omitted facts as follows:

At trial Mr. France testified that after a heated domestic argument with the respondent, Darlina France, his wife, he started "beating the hell out of her." Tr. 52, 73. He "grabbed ahold of her throat" and "slammed her up side [sic] the head." Then, he "threw her down on the floor, picked her back up and threw her back again, and slammed her up [sic]." Tr. 53. Finally, he "threw her down" on broken glass on the floor. Tr. 54.

Mr. France admitted to engaging in brutally assaultive behavior before, having put a former wife in the hospital. Tr. 73, 310. Mrs. France was particularly vulnerable to this type of violence, since she previously had been repeatedly and seriously abused by a former husband in a prior marriage. Tr. 73, 309. To stop her former husband's repeated beatings, which continued even after they separated, Tr. 310, she once "shot up over his car" with a gun. Tr. 311.

Mrs. France testified that after the brutal beating by her husband, she believed she would continue to be beaten, because "he kept coming." Tr. 316, 345, 353. To protect herself she retrieved the gun that he had given her earlier and pointed it towards him to frighten him. When he stopped coming towards her, she testified that she tried to uncock the gun, but the hammer slipped, and she accidentally shot him in the shoulder. Tr. 317. Immediately after the shooting she rushed

---

[1] Respondent alerted the government to its error in her brief opposing certiorari at page 2, but the government has apparently ignored respondent's point, because the facts set forth in its brief on the merits are virtually identical to those set out in its petition.

over to her husband and stated, "Oh my God, I shot you. I didn't mean to." Tr. 61, 71, 101. She told her daughter to call an ambulance, Tr. 100, 151, 157, and she begged her husband's forgiveness. Tr. 61, 71, 101, 151, 157. She later visited him in the hospital and told him she was "very sorry." Tr. 63.

Mr. France testified that he too believed that the shooting was accidental. Tr. 64, 67, 201, 205. He corroborated that the gun had a very light trigger pull and that, previously, he himself had accidentally fired the gun, almost shooting himself in the leg. Tr. 64, 70. After Mr. France was released from the hospital, he resumed living with Mrs. France and their two children without incident. Tr. 63, 79. During this period Mrs. France was assisting her husband with his therapy. Tr. 77, 87. They had a good relationship, Tr. 79, loved each other and planned on staying together. Tr. 320.

Mr. France did not file charges against Mrs. France and, in fact, requested that she not be prosecuted. Tr. 79, 201; Pet. App. 3a. Notwithstanding the plea of Mr. France not to prosecute his wife, the government charged Mrs. France in Count I with assault with intent to commit murder in violation of 18 U.S.C. § 113(a), and in Count II with assault resulting in serious bodily injury, in violation of 18 U.S.C. § 113(f). Finally, she was charged in Count III with using a firearm during commission of a crime, in violation of 18 U.S.C. § 924(c) which, upon conviction, carries a mandatory consecutive five-year sentence without possibility of probation or parole. After a jury trial Mrs. France was convicted on Count I of the lesser included offense of assault with a dangerous weapon in violation of 18 U.S.C. § 113(c), and was found guilty as charged on Counts II and III.

At sentencing before the Honorable Robert J. Kelleher, Mr. France, through written correspondence, urged that his wife not be sent to prison. Tr. Sentencing 15. Judge Kelleher "expressed hostility" to the statute's requirement that he sentence France to the mandatory five-year sentence without parole. *France*, Pet. App. 4a. He said her case did not warrant such a sentence. *Id.* He said the statute had relegated him to only a "*pro forma*" performance and that he "might as well go fishing on the day of sentence and ask the clerk to pronounce

sentence." *Id.* The court sentenced France to two concurrent terms of probation on the assault charges, but the judge felt bound by the mandatory penalty provision of § 924(c) to impose a five-year sentence without parole on Count III, and he so ordered. In its decision the Ninth Circuit agreed with Judge Kelleher's views as to the inappropriateness of separating France from her husband and her two children for five years. Furthermore, the court thought that the government's prosecution of France under the five-year mandatory penalty provision of § 924(c) was so heartless that it cited to the government Portia's speech on the quality of mercy from Shakespeare's *The Merchant of Venice*. Pet. App. 11a-12a.

2. Procedure Pertaining To Jury Selection And The Appeal.

As the government concedes, at the time of respondent's trial it was the "regular practice" in the District of Hawaii to have magistrates select the jury in "virtually all" felony cases. Pet. Cert. 3, 7. Pursuant to that policy, jury selection in the instant case was presided over by Magistrate Bert Tokairin. J.A. 5-6.

France's trial counsel was Benjamin Cassiday, Jr., who had formerly been an Assistant Federal Public Defender acting under the supervision of respondent's current counsel on appeal, Michael R. Levine, the Federal Public Defender for the District of Hawaii. As an Assistant, Cassiday had direct experience with the Hawaii policy of delegating to magistrates all jury selections because in at least two earlier cases, *United States* v. *Wilhelm*, Cr. No. 84-0994 (D. Haw. Aug. 6, 1984) and *United States* v. *Von Hemert*, CR. No. 84-2201 (D. Haw. Nov. 29, 1984), he had fruitlessly objected to jury selection by Magistrate Tokairin, both orally and in writing. *See* Lodged Documents A and B.[2] Cassiday objected to Magistrate Tokairin's

[2] Respondent has lodged with the Clerk five public court records, Documents A-E, whose validity is not subject to dispute and of which the Court is requested to take judicial notice. *See Boag* v. *MacDougall*, 454 U.S. 364, 367 (1982) (Rehnquist, J., dissenting); *Mas-*

selecting the jury on the same grounds as did the defendant in *United States* v. *Gomez*, 109 S. Ct. 2237 (1989): that no statute authorized the procedure and that, in any event, such a statute would be unconstitutional. *See* Lodged Document B. This objection was overruled by Magistrate Tokairin, and Cassiday appealed to the Chief Judge of the District of Hawaii. In a written decision, the Chief Judge sustained the Magistrate and held that it was proper for him to select the jury notwithstanding any objection. *See* Lodged Document C.

Levine, Cassiday's supervisor, had also unsuccessfully objected to magistrates selecting the jury. He challenged the Hawaii policy in *United States* v. *Bezold*, Cr. No. 82-1027 (D. Haw. Feb. 28, 1984), *see* Lodged Document D, tried before the Chief Judge himself, but the policy was affirmed by the Ninth Circuit in *United States* v. *Bezold*, 760 F.2d 999 (1985), and this Court denied certiorari in the case on January 16, 1986. *See* 474 U.S. 1063 (1986). Moreover, in *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985), in an opinion authored by now-Justice Kennedy, the Court of Appeals reaffirmed the validity of the policy in a case arising in another district.

Therefore, when jury selection in the instant case began on April 27, 1987 before Magistrate Tokairin, Cassiday made no

---

sachusetts v. *Westcott*, 431 U.S. 322, 323 n.2 (1977).

Document A is a copy of the docket sheets from *Wilhelm*. The entry for June 18, 1984, the date of jury selection in that case, notes as follows: "jury selection—jury called for jury selection—43 jurors present. Objection by Cassida[y] in regards to magistrate conducting jury selection. Objection noted and DENIED. [12 Jurors Selected By Tokairin]."

Document B is a copy of the written objection that Cassiday filed to having Magistrate Tokairin preside over jury selection in *Von Hemert*. Document C is the Chief Judge's written opinion overruling Cassiday's objection. Document D is Levine's written objection in *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986). Finally, Document E is a copy of 2 pages only from docket sheets in *United States* v. *Rewald*, Cr. No. 84-2417 (D. Haw. Dec. 9, 1985), referred to at Pet. Br. 26 and in this brief at 23 n.9.

objection because objection reasonably appeared to him to be futile under the firmly entrenched practice of the district as well as under the existing law at both the district and appellate court levels. *France*, Pet. App. 11a (objection by counsel "clearly" futile). Significantly, however, neither Cassiday nor respondent herself gave express consent to the procedure.

During jury selection, Magistrate Tokairin did ask the prospective jurors a question that Cassiday posed regarding attitudes toward guns. However, he refused Cassiday's request to ask a question regarding the prospective jurors' attitude toward Vietnam War veterans. J.A. 48-49. This was an important question because Mr. France was a Vietnam veteran and Cassiday believed that some people had "strong" feelings about such veterans. *Id.*

On appeal from respondent's conviction, she challenged only the constitutionality of the mandatory sentencing provision of the § 924(c) conviction, and did not raise the magistrate issue, continuing to believe it to be futile to do so. After oral argument in the Court of Appeals, while the decision below was pending, this Court decided *Gomez*. In *Gomez* the Court unanimously held that a magistrate has no jurisdiction to preside over jury selection because Congress had not statutorily conferred this power. Moreover, even though the defendant in *Gomez* could show no prejudice, the Court held that because he had a "basic" right "to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside," harmless-error analysis could "never" be applicable. *Gomez*, 109 S. Ct. at 2248.

Within three weeks of the decision in *Gomez*, while the appeal in *France* was still pending, respondent moved the Court of Appeals to reverse her conviction under *Gomez* because a magistrate had selected the jury. After receiving supplemental briefs from the parties, the Court of Appeals agreed. It held, first, that *Gomez* should be applied retroactively to respondent's case because it was pending on direct appeal. The court then held that respondent had not waived her right to raise the *Gomez* claim by her counsel's failure to object in the district court for two reasons. First, no objection was

necessary because, as a "broad, definitive" jurisdictional rule, *Gomez*, did not require an objection. Pet. App. 9a, 6a, n.1. Second, in view of *Bezold* and *Peacock*, the Ninth Circuit's "solid wall" of precedent that had authorized magistrate voir dire even over a defendant's objection, any objection by Cassiday would have been futile. Pet. App. 9a-11a. The court reasoned that requiring a futile objection would be senseless because it would encourage defense counsel "to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned . . . ." Pet. App. 10a (quoting *Guam* v. *Yang*, 850 F.2d 507, 512 n. 8 (9th Cir. 1988) (en banc)).

Finally, citing the Court's language in *Gomez*, the Court of Appeals reasoned that the rule announced in *Gomez* "touches on one of the most basic rights of the accused," Pet. App. 10a, the right to have "all critical stages of a criminal trial conducted by a person with jurisdiction to preside." Pet. App. 6a (quoting *Gomez*, 109 S. Ct. at 2248). In view of the importance of this right and in view of the Ninth Circuit precedents which until *Gomez* had authorized the procedure violating that right, the Court of Appeals held that it would be "at best unseemly, and at worst irresponsible" to penalize respondent "for following the law as it existed at the time her jury was selected." Pet. App. 10a.

SUMMARY OF THE ARGUMENT

There are four independent grounds for affirming the judgment below.

I. The Court of Appeals correctly held that the contemporaneous objection requirement of Rule 51 does not bar relief here, because any objection at trial would have been futile in light of the firmly entrenched district court practice that respondent's counsel had previously challenged on appeal to no avail, which resulted in adverse controlling Ninth Circuit authority.

A. Many decisions of this Court have recognized that the contemporaneous objection requirement does not bar relief, especially on direct appeal, where objection at the time of trial

would have been futile. In addition to the specific circumstances where futility had been recognized by the Court, courts of appeal have held that the futility is sufficiently established where adverse controlling circuit court precedent—a wall of circuit court authority—made any such objection hopeless. Hence the legal rule relied on by the Ninth Circuit is sound.

B. Under that legal rule, respondent's failure to object to the magistrate's jurisdiction over jury selection at the time of her trial does not preclude relief under *Gomez*. The Ninth Circuit had twice squarely rejected the precise claims later accepted by this Court in *Gomez;* this Court had denied certiorari on both occasions; and no other circuit had disagreed. The United States' argument that nothing in those Ninth Circuit decisions prevented the district court from deciding to conduct voir dire itself, had respondent so requested, fails to undermine the Ninth Circuit's finding of futility. The record shows that the Hawaii district court had adopted a firm practice of assigning voir dire to magistrates under which the latter had presided over "virtually all jury selection proceedings." Pet. App. 13a. The Hawaii Federal Public Defender, respondent's current counsel, and his former assistant, respondent's trial counsel, had challenged that practice, but their objections had been rejected by the magistrate, the district court, and the Ninth Circuit, with this Court denying certiorari. Thus by the time of respondent's trial, the Hawaii practice was firmly entrenched and had withstood challenge to the exhaustion of appellate remedies, and the Federal Defender and his assistant had worn out their welcome on this subject with the magistrate and the district court.

C. The Court of Appeals' finding that objection would have been futile in light of local practice and Ninth Circuit authority is entitled to deference from this Court, because the effect of its precedent on the districts within the circuit is a matter peculiarly within the province of the Court of Appeals. This is particularly true in the instant case where that finding is supported by ample evidence of futility.

D. The habeas corpus doctrine of futility relied on by the government is inapposite, as state-federal comity considera-

tions animating the strict "cause and prejudice" test are not present here. In any event, even this strict test is satisfied.

E. Finally, policy considerations strongly support the judgment below. Judicial economy strongly militates against requiring objections that are foreclosed by a solid wall of circuit authority. Otherwise conscientious defense advocates would be compelled to burden the trial and appellate court with repeated assaults on settled principles in order to guard against the possibility, however remote, that those principles might later be overturned. The interests of justice are also advanced by affirming the judgment below, for it would be unfair to respondent to penalize her for her counsel's good faith reliance on the existing law and for his failure to possess extraordinary vision. On the other hand, an objection at trial would have served none of the goals of the contemporaneous objection rule, and the government concedes that those purposes are not furthered where futility in fact exists.

II. Because a magistrate selected the jury in this felony case, the conviction is void for two reasons. First, the Court unanimously held in *Gomez* that Congress did not confer jurisdiction on magistrates to select juries in a felony case. Therefore, even respondent's express consent could not confer the subject matter jurisdiction on the magistrate that Congress withheld. Thus, because a critical part of the trial was conducted by a person without jurisdiction, the trial was not held before a competent tribunal and respondent's conviction was void.

Moreover, the government acknowledges that there are jurisdictional "limits" to the extent to which a court may delegate criminal trial functions. Pet. Br. 20. Thus the government concedes that even with consent a court could not delegate trial functions to a "panel of citizens" because such a delegation would be a "flagrant departure" from traditional procedures and would seriously affect "the fairness, integrity or public reputation of the public proceedings." Pet. Br. 20-21. Because there is no principled way to distinguish the delegation in the instant case from that posited by petitioner, the decision below should be affirmed.

Second, respondent was deprived of her Article III right to have an Article III judge presiding at jury selection, a critical

stage of her felony trial. This right is a nonwaivable structural right that arises from the core of Article III § 1 as well as from Article III § 2, cl. 3, which guarantees the right of trial by jury. A legitimately constituted jury necessarily includes an Article III judge presiding at jury selection.

III. A final exception to the contemporaneous objection rule which justifies affirmance of the decision below is "plain error." In *Gomez* this Court unanimously held that violation of the defendant's "basic" right to have a "person with jurisdiction to preside" requires reversal without any showing of actual prejudice. Furthermore, the Court equated the error to that in having a biased judge and held that such an error "could never be treated as harmless." *Gomez*, 109 S. Ct. at 2248. Because such a fundamental error seriously affects the integrity or public reputation of the courts, and because its harmful effect on the jury is impossible to measure, it follows that the error is "plain."

IV. The result in *France* should also be affirmed on grounds briefed by the parties in the Court of Appeals, but not addressed by that court. Assuming, *arguendo*, respondent could have waived her right to have an Article III Judge select the jury, failure to object by respondent's counsel was insufficient to establish a valid waiver. Whether or not the basic jurisdictional right identified in *Gomez* is a constitutional right conferred by Article III, the intent of Congress and the weight of court precedent make clear that this basic trial right cannot be waived by the mere failure of counsel to object. Thus, because there is no evidence of a knowing and express consent by respondent herself, the decision below should be affirmed.

ARGUMENT

I. THE CONTEMPORANEOUS OBJECTION RULE DOES NOT BAR RELIEF BECAUSE OBJECTION WOULD HAVE BEEN FUTILE IN LIGHT OF THE ENTRENCHED DISTRICT COURT PRACTICE AND A SOLID WALL OF NINTH CIRCUIT AUTHORITY SUSTAINING THAT PRACTICE.

A. The Contemporaneous Objection Rule Does Not Preclude Relief Where Objection Would Have Been Futile Under Controlling Circuit Authority.

Respondent fully acknowledges the importance of the contemporaneous objection rule. This rule, however, is not sacro-

sanct and "giving effect to [it] for its own sake 'would be to force resort to an arid ritual.'" *Henry* v. *Mississippi*, 379 U.S. 443, 447-48 (1965) (quoting *Staub* v. *City of Baxley*, 355 U.S. 313, 320 (1958)). After all, "[r]ules of practice and procedure are devised to promote the ends of justice not to defeat them." *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941); *see* Fed. R. Crim. P.2 (the federal rules "are intended to provide for the just determination of every criminal proceeding").[3] Thus, as petitioner concedes, the Court has recognized several important exceptions to the contemporaneous objection rule. This case falls within those exceptions.

The first exception and one of the two bases upon which the Court of Appeals rested is "futility." It may be true, as the government asserts, Pet. Br. 24, that this Court has never explicitly enunciated a general "futility" exception to the contemporaneous objection rule. Nevertheless, the Court has *implicitly* recognized the exception and has applied it to excuse failures to object in a variety of contexts both on direct appeal and in habeas corpus cases. *See Osborne* v. *Ohio*, 110 S. Ct. 1691, 1703-05 (1990) (failure to request jury instruction in state trial on elements of lewdness did not waive issue where request "patently futile" in light of trial judge's earlier ruling on motion); *Reed* v. *Ross*, 468 U.S. 1, 17 (1984) (failure to object in state court to instruction on burden of proof was excused where at time of trial there was no reasonable basis for the objection under the prevailing law); *Grosso* v. *United States*, 390 U.S. 62, 70-71 (1968) (failure to raise Fifth Amendment claim below excused because of its futility in light of prevailing law); *Leary* v. *United States*, 395 U.S. 6, 27-29 (1969) (failure to raise objection below to constitutionality of the statute was futile in light of prevailing law). The State, too, has been the beneficiary of the futility doctrine. For example, in *Pennsylvania* v. *Ritchie*, 107 S. Ct. 989 (1987), the Court held that the State was

[3] Rule 2 in its entirety reads as follows, "Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

not required to raise a fruitless Sixth Amendment claim to the state court before seeking federal relief when the state court had already adversely decided the issue.[4] *Id.* at 997 n. 7.

The Court has recognized a futility exception particularly in cases where, as here, there has been a significant change in the law since the trial. For example, in *Grosso*, the Court rejected the government's argument that the defendant had waived a Fifth Amendment defense to his failure to pay excise tax on his gambling proceeds by failing to raise his claim at trial. The Court reasoned that "[g]iven the decisions [of this Court's prior cases] which were on the books at the time of petitioner's trial" his failure to object below was understandable. *Grosso*, 390 U.S. at 71.

Petitioner seeks to explain away *Grosso* on the ground that the defendant's objection was "novel" rather than "futile," Pet. Br. 23, but that explanation is unpersuasive. There was nothing

[4] The Court's application of the futility principle to excuse a failure to object below may be viewed as a specific application of the Court's more general power to excuse such a failure in order "to promote the ends of justice." *Hormel*, 312 U.S. at 557. To promote justice the Court has said that "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Court of Appeals, to be exercised on the facts of individual cases." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976); *see In re Howell*, 731 F.2d 624, 627 (9th Cir.), *cert. denied*, 469 U.S. 933 (1984) ("Rule of waiver is one of discretion rather than jurisdiction . . . and may also be relaxed . . . when injustice might otherwise result"). This is particularly true on direct appeal from a federal criminal conviction. *See Grosso*, 390 U.S. at 71 (although claim not raised below, Court has discretion under 28 U.S.C. § 2106 to dispose of case "as may be just under the circumstances"); *On Lee* v. *United States*, 343 U.S. 747, 750 n.3 (1952) (Court of Appeals acted within its discretion in considering the issue even absent objection).

Thus, even absent objection below, appellate courts rightly exercise their discretion to reach issues where otherwise, as in the case at bar, "the interests of justice" would not be advanced. *E.g.*, *Henderson* v. *Dep't of Public Safety*, 901 F.2d 1288 (5th Cir. 1990); *United States* v. *La Guardia*, 902 F.2d 1010, 1021 (1st Cir. 1990).

"novel" about the idea that the Fifth Amendment could serve as a defense to the nonpayment of taxes on gambling proceeds. Indeed, courts had been dealing with similar issues for many years before *Grosso*. *See, e.g.*, *United States* v. *Costello*, 352 F.2d 848, 850-51 (2d Cir. 1965) (discussing cases), *rev'd sub nom. Marchetti* v. *United States*, 390 U.S. 39 (1968).

Similarly, in *Reed* the Court held that a defendant's failure to object to a jury instruction in state court on the burden of proof was excused because "the state of the law at the time of Ross's appeal did not offer a reasonable basis upon which to challenge the instruction." *Reed*, 468 U.S. at 16-17. It is true that *Reed* uses the term "novel[ty]" rather than "futility." *Id.* at 22. It seems clear, however, that, as in *Grosso*, there was nothing at all "novel" about Ross's objection because, as pointed out in the dissent, "the framework for respondent's claims" was in place and "had been settled" many years earlier. *Id.* at 25-26 (Rehnquist, J., dissenting). Thus "the legal basis for making his claim was reasonably available to him." *Id.* at 25 n.2. In the case at bar, as in *Reed*, "the state of [Ninth Circuit] law" at the time of respondent's trial "did not offer a reasonable basis upon which to challenge" the magistrate's conduct of jury selection. Therefore, respondent's failure to object at trial was properly excused.

Also illustrative is *Osborne*. In that case the defense counsel made a motion to dismiss a lewdness charge on the ground that the underlying statute was overbroad, but he failed to request the judge to instruct the jury on the elements of lewdness after the motion was denied. On appeal the defendant argued that the failure to instruct the jury was reversible error, but the government, as in the instant case, argued that the attorney had waived the issue by not requesting the instruction. This Court rejected the government's argument and held that in light of the trial judge's earlier ruling denying the defense motion, a request for the instruction would have been "patently futile." *Osborne*, 110 S. Ct. at 1705 (quoting *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965)). Although in *Osborne* trial counsel's failure to request the instruction was before the same judge who had denied his motion in the same case, the futility principle applies equally well to the instant case, where

respondent's counsel had fruitlessly objected before the same magistrate in *different* cases. The request in either situation was equally futile.

Yet another example is *Estelle* v. *Smith*, 451 U.S. 454 (1981), in which this Court rejected the state's argument that the defendant had waived a Fifth Amendment claim by failing to object below. In rejecting the argument, the Court adopted "the reasons stated by the Court of Appeals," *id.* at 469 n.12, one of which was the "apparent futility" of the objection in light of the prevailing law. *Smith* v. *Estelle*, 602 F.2d 694, 708 n.19 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981). Thus, in the case at bar as in *Estelle*, respondent's failure to object to Magistrate Tokairin presiding over jury selection should be excused because of its "apparent futility." *Cf. Castille* v. *Peoples*, 109 S. Ct. 1056, 1059 (1989) (where results "have effectively been predetermined" by state law, it makes no sense to require a defendant to return to state court to exhaust remedies).

Additionally, circuit courts have long applied the futility principle to excuse counsel's failure to object or to raise an issue at trial because of futility under the prevailing law.[5] For exam-

---

[5] *See Callanan* v. *United States*, 881 F.2d 229, 231 (6th Cir. 1989) (fact that issue "appeared to be settled" constituted cause for not raising it), *cert. denied*, 110 S. Ct. 1816 (1990); *United States* v. *Mulder*, 889 F.2d 239, 240 (9th Cir. 1989) (intervening Supreme Court decision constitutes good cause for failure to raise issue below); *Ingber* v. *Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988) (defendant not required to pursue futile course); *Guam* v. *Yang*, 850 F.2d at 512 n.8 (failure to object to jury instruction not waiver where objection futile in view of circuit law); *Smith* v. *Estelle*, 602 F.2d at 708 n.19 (Sixth Amendment issue considered on appeal, although not raised at trial because of surprise and apparent futility in raising point); *United States* v. *Indiviglio*, 352 F.2d 276, 280 n.7 (2d Cir. 1965) (en banc) ("Appellate courts often notice error not objected to below when, under the law existing at the time of trial, objection would have been futile"), *cert. denied*, 383 U.S. 907 (1966); *Angelet* v. *Fay*, 333 F.2d 12 (2d Cir. 1964) (failure to object to admission of evidence not waived where futile under existing law), *aff'd*, 381 U.S. 654 (1965); *United States* v. *Liguori*, 438 F.2d 663, 665 (2d Cir. 1971) (failure to raise

ple, in *United States* v. *Byers*, 740 F.2d 1104, 1109 n.6 (D.C. Cir. 1984), now-Justice Scalia, writing for the D.C. Circuit, excused the defendant's failure to raise a Fifth Amendment claim below on the ground that under the existing law counsel "could well have thought the objection futile." *See also Byers*, 740 F.2d at 1132 n.52, 53 (Robinson, J., concurring) (collecting cases); *see generally* 3 W. LaFave & J. Israel *Criminal Procedure* 252 (1984) (courts "may also consider objections not raised at trial where an intervening ruling established the grounds for the objection and counsel's failure to raise the issue was understandable in light of the controlling precedent at the time of the trial"). In the instant case, as in *Byers*, defense counsel's failure to object below was properly excused because he "could well have thought the objection futile," *Byers*, 740 F.2d at 1109 n.6, in light of the Ninth Circuit precedent, the entrenched Hawaii practice, and his supervisor's past fruitless efforts to object to the same magistrate conducting voir dire.[6]

When the Court of Appeals in the case at bar held that respondent's objection was excused in light of the "solid wall" of contrary Ninth Circuit authority at the time of her trial, it simply applied that well-settled futility exception. Contrary to the government's implication, Pet. Br. 21-22, the "solid wall" principle is not an anomaly. Rather, to promote judicial econ-

---

issue of unconstitutionality of statutory presumption, where only one circuit had so held, was "futile"); *O'Connor* v. *New Jersey*, 405 F.2d 632, 634 n.2 (3d Cir.) ("considering the law at the time of [the defendant's] trial, it would have been a futile gesture to have objected" to the evidence), *cert. denied, sub nom. Yeager* v. *O'Connor*, 395 U.S. 923 (1969).

[6] The government attempts to distinguish *Byers* on the ground that defense counsel had objected to the evidence albeit on other grounds. Pet. Br. at 25 n.14. This is a distinction without a difference because in applying the contemporaneous objection rule, courts have not distinguished between failure to object at all and failure to object on the proper grounds. *See* 3A C. Wright, *Federal Practice and Procedure* § 843 at p. 292-93 (1982) ("So, too if a specific objection on one ground is overruled, the party cannot raise some other ground for the objection on appeal") (citing cases).

omy as well as the interests of justice, this exception had been repeatedly affirmed by the Ninth Circuit for twenty years before the instant case was decided. *See United States* v. *Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970) (en banc) (requiring futile objections to jury instructions will produce "unhappy result" of encouraging counsel "to burden district courts with repeated assaults on then settled principles"); *Guam* v. *Yang*, 850 F.2d at 512 n.8 (same); *Guam* v. *Ibanez*, 880 F.2d 108, 111 & n.2 (9th Cir. 1989) (same), *cert. denied*, 110 S. Ct. 2631 (1990).

Moreover, as petitioner concedes, the other courts of appeals have also recognized a futility exception in cases involving controlling adverse circuit court authority. *See United States* v. *Grant*, 489 F.2d 27, 29 (8th Cir. 1973) (because of "solid wall" of Eighth Circuit authority, objection below futile); *Martone* v. *United States*, 435 F.2d 609, 610-611 (1st Cir. 1970) (because of "solid wall" of circuit authority failure to object excused); *Liguori*, 438 F.2d at 665 (where only one circuit had held statutory presumption unconstitutional, but all others including Second had not, objection below "patently futile");[7] In fact, the exception's application to the instant case has not been criticized by any of the other circuit courts that have addressed the *Gomez* issue. Rather, each has distinguished *France* on the ground that, in each particular circuit, prior precedent was not solid, as it was in the Ninth. *See United States* v. *Lopez-Pena*, 890 F.2d 490, 497, Lexis 17515, 19 (1st Cir. 1989) ("[I]n this circuit, unlike in the Ninth, there was no 'solid wall of circuit authority'" which would render the objection futile), *withdrawn and reh'g granted* February 9, 1990; *Musacchia*, 900 F.2d at 502 ("In contrast [to the Second Circuit], the Ninth Circuit already had ruled in two cases decided four years prior

---

[7] Inexplicably, the Second Circuit majority in *United States* v. *Musacchia*, 900 F.2d 493, 502 (2d Cir. 1990), denied that the Second Circuit had established an exception to the contemporaneous objection rule based on a "solid wall" of contrary authority. This denial, however, is contradicted by its earlier holdings in *United States* v. *Rivera*, 513 F.2d 519, 525-26 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975), *Liguori*, 438 F.2d at 665, *Angelet*, 333 F.2d at 12, and the recognition of the doctrine in *Indiviglio*, 352 F.2d at 280 n.7.

to *Gomez*—certiorari had been denied in both—that magistrates were empowered to conduct voir dire").[8] In sum, the Court of Appeals properly held that objection by counsel was futile under Ninth Circuit law.

B. Any Objection At Respondent's Trial Would Have Been Futile In Light Of The Firmly Entrenched Hawaii Practice.

The United States concedes that there was controlling Ninth Circuit law rejecting precisely the challenge to magistrate *voir dire* later recognized by this court in *Gomez*. The government primarily argues, instead, that an objection by respondent

---

[8] Contrary to petitioner's argument, at the time of respondent's trial the "wall" of adverse authority extended beyond the Ninth Circuit and consisted of much more than the "two bricks" of *Peacock* and *Bezold*. Pet. Br. 26 n.16. Although it is true that in *United States* v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983), the First Circuit held that having a magistrate preside was not plain error, the circuit, nevertheless, proceeded to praise the procedure and expressly approve it. *Id.* at 872-74. Indeed, Hawaii's Chief Judge expressly relied on *Rivera-Sola* in approving the Hawaii practice of delegating jury selection to magistrates and noted that the case "has specifically approved the use of magistrates to conduct jury selection." *See* Lodged Document C.

Yet another brick was put in place by *United States* v. *Ford*, 797 F.2d 1329, 1332 (5th Cir. 1986), *cert. denied*, 474 U.S. 1070 (1987), in which the Fifth Circuit also expressly approved the practice at issue. To be sure, at the time of jury selection in France's case, April 27, 1987, a petition for rehearing in *Ford* had been granted; but, rightly or wrongly, the parties still looked to *Ford* as precedent, just as the parties in the instant case, rightly or wrongly, have been citing *United States* v. *Lopez-Pena*, even though it has been withdrawn pending an en banc decision. Only the Second Circuit in *United States* v. *DeFiore*, 720 F.2d 757 (1983), *cert. denied*, 467 U.S. 1241 (1984), expressed no opinion on the practice other than that the error, if any, was not "plain." But nothing in *DeFiore* suggested that the Second Circuit would not approve the practice in the future even over objection, as in fact it later did in *United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez*.

might not have been futile because Ninth Circuit law only approved—rather than required—such action, and the trial court might have chosen to select the jury in this particular case. Pet. Br. 11. This argument is simply not correct. As noted above, the United States' own affidavit filed in the court below established that, since the mid-1980's, the District of Hawaii practice had been such that magistrates had been assigned to preside over "virtually all jury selection proceedings." Pet. App. 13a. And, as also established above, the Chief Federal Public Defender as well as his assistant, respondent's trial counsel, repeatedly challenged the practice, only to have their objections overruled at trial and by the Ninth Circuit.[9]

By the time of respondent's trial, no further purpose was served by continuing to object over and over, since the District Court was fixed on its practice, and its practice had twice been

---

[9] The only alleged exception in the Ninth Circuit cited by the government is the Hawaii case *United States* v. *Rewald*, Cr. No. 84-2417 (D. Haw. Dec. 9, 1985), Pet. Br. 26. *Rewald* does not assist the petitioner for two reasons. First, the jury in *Rewald* was selected by Chief Judge Fong on August 5, 1985, *before* certiorari was denied in either *Peacock* or *Bezold*. *See* Lodged Document E (Docket Sheet Excerpt from *United States* v. *Rewald*). Thus, at the time of Rewald's trial, the wall was "rather porous." *See Lopez-Pena*, Lexis 17515 at 21.

Second, as respondent pointed out in her brief opposing certiorari, it was the *government*, as well as the defense, who objected to the magistrate conducting jury selection. In its certiorari reply brief the government conceded this point. Pet. Reply Br. 2 n.1 (in the *Rewald* case "the *parties*" persuaded the district judge to select the jury). In its current brief, however, it has apparently overlooked this concession. Of course when the government objects to a procedure, as it did in *Rewald*, it can hardly now argue that the objection was sustained because of the defendant's objection. *Cf. Gomez*, 109 S. Ct. at 2245 ("In criminal cases the government may petition for trial before a district judge"); *United States* v. *Sayeedi*, 903 F.2d 88, 91 (2d Cir. 1990) (magistrate may not conduct voir dire over government's objection).

sustained on appeal and through certiorari to this Court.[10] This conclusion is confirmed by the decision in *United States* v. *Baron*, 721 F. Supp. 259 (D. Haw. 1989), appeal pending, where the district court found in yet another case that objection by the Public Defender to jury selection by Magistrate Tokairin "would have been futile." *Id.* at 262. The court found that the Public Defender "has objected to this practice in other cases and has appealed the denial of such objection without success." *Id.* And, finally, the fact that respondent's counsel believed the objection to be futile—and was not "sandbagging," as the government hypothesizes—is proven by the fact that counsel did *not* raise this issue in the Court of Appeals until *after* this Court's decision in *Gomez*.

In sum, this case fits squarely within the class of cases where a contemporaneous objection would have been futile. Trial counsel's earlier fruitless objections before Magistrate Tokairin prove the futility of yet another objection in the case at bar. They also refute the government's unfounded speculation that trial counsel might have "prefer[red]" Magistrate Tokairin in the instant case and was "quite happy" with the Magistrate.[11] Pet. Br. 28.

---

[10] It is, of course, true that the Court has repeatedly stated that the denial of certiorari does not suggest in any way how the Court views the merits of a case. Nevertheless, where the Court has twice denied certiorari on the same issue from the same circuit, defense counsel would not act unreasonably in inferring that the Court was not about to question the soundness of the Hawaii practice. *See Griffin* v. *United States*, 336 U.S. 704, 716-717 (1949) (repeated denial of certiorari implies recognition of circuit's right to formulate rules of evidence); *Smith* v. *Smith*, 454 F.2d 572, 579 n.4 (5th Cir. 1971) (denial of certiorari and other actions of the Court made it "patently obvious" that the Court approved circuit holdings), *cert. denied*, 409 U.S. 885 (1972); *Snider* v. *Peyton*, 356 F.2d 626, 627 n.5 (4th Cir. 1966) (under some circumstances denial of certiorari "lends some support" to conclusion that constitutional question is not present).

[11] The government asserts that Cassiday "expressed satisfaction with the procedure by which the jury was selected." Pet. Br. 6. It is true that in response to the magistrate's question whether Cassiday objected to anything "in the manner in which the jury was selected," Cassiday said, "no." J.A. 54. However, in view of Cassiday's history with the entrenched Hawaii practice, the answer must be understood in the context of his unwillingness to raise a futile objection to the magistrate's jurisdiction.

Moreover, the government's emphasis on counsel's state of mind proves too much. Even when an attorney objects to a procedure, the objection does not necessarily mean that he really prefers something different. He may object in any event, knowing the objection will be overruled, in order to have an issue on appeal. For this reason, courts do not look to the subjective belief of the attorney but rather to what a reasonable attorney could have believed in view of the existing law. *See Byers*, 740 F.2d at 1109 n.6.

This Court has also recognized that the practice of the district court can be such as to render an objection futile in practice if not in law. For example, in *Osborne* nothing in the law would have compelled the state judge to refuse to give the jury instruction at issue if the defense attorney had requested it. Nevertheless, the Court found that any such request would have been "patently futile." *Osborne*, 110 S. Ct. at 1705 (quoting *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965)). Similarly, in *Reed*, had defense counsel asked for the jury instruction on the burden of proof, nothing would have compelled the trial judge to refuse to give it.

The circuit courts have also applied the same principle with respect to an entrenched district court practice. For example, in *Hernandez* v. *Beto*, 443 F.2d 634 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971), counsel failed to object to his client's being tried in jail clothes. Obviously nothing in the law *required* the trial judge to try the defendant in jail clothes. Nevertheless, the Court of Appeals excused the failure to object on the ground that because such trials were the court's "common practice," any such objection was apparently futile. *Id.* at 636.

Also illustrative is *United States* v. *Rivera*, 513 F.2d 519 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975), in which the defendant "specifically stated he had no objection" at trial to the admission of the grand jury transcript of the testimony of a witness. *Id.* at 525. Nevertheless, on appeal the defendant claimed the

admission was error. Although nothing in the law required the judge to admit the transcript, the court of appeals rejected the government's argument that the failure to object below barred appellate review. The Court reasoned that in light of the circuit's earlier precedent, counsel "could have considered objection futile so far as the district judge or this court were concerned . . . ." *Id.* at 526. In the case at bar, as in *Rivera*, respondent "could have considered objection futile" both as far as the district court and the Ninth Circuit were concerned.[12]

Thus, the instant case stands in stark contrast to a case in which objection is not futile because the trial court has made clear that it would act favorably on the defendant's objection. In that situation, where the defendant nevertheless does not object, true forfeiture occurs. *See Estelle* v. *Williams*, 425 U.S. 501 (1976) (where Court made clear that it would permit defendant to be tried in civilian clothes, failure to object to trial in jail clothes waived the issue). For this reason, the government's reliance on Justice Powell's concurrence in *Estelle* is misplaced. In his opinion Justice Powell stated that counsel should not be allowed "deliberately to forgo objection to a curable trial defeat, even though he is aware of the factual and legal basis for an objection simply because he thought objection would be futile." *Id.* at 515. This statement must, of course, be read in connection with the facts of *Estelle* where objection was obviously not futile because it was clear that *had* the objection been made, it would have been acted upon. Justice Powell was saying only that a mere belief by counsel which is not objectively founded on any entrenched practice or wall of authority cannot constitute futility. In the case at bar, by contrast, Cassiday's belief *was* objectively founded.

---

[12] *See also United States* v. *Clark*, 475 F.2d 240, 247 n.6 (2d Cir. 1973) (failure to object to defendant's absence did not waive Sixth Amendment issue because an objection "may have appeared [to counsel] to be futile"); *cf. Callanan*, 881 F.2d at 231 (where issue of application of mail fraud statute "appeared to be settled," counsel showed "cause" for not raising it).

C. This Court Should Defer To The Court Of Appeals' Assessment Of The Effect Of Its Precedent And Of The Local Practice.

The Court of Appeals' assessment of the effect of its precedents *Peacock* and *Bezold*, and of the local practice of the Hawaii district court, a district within the circuit, is a matter peculiarly within the province of the Ninth Circuit, to which this Court should defer as it has with similar matters. *See Henderson* v. *United States*, 476 U.S. 321, 328 n.9 (1986) (interpretation of district's local rule is "a matter on which we should defer to the Court of Appeals for the Ninth Circuit"). Deference is appropriate if only because the Ninth Circuit is "in closer touch with the facts and factors presented in the workings of the regular activities of the district courts within a circuit." *Ehrlichman* v. *Sirica*, 419 U.S. 1310, 1311 (1974) (Burger, C.J., sitting as Circuit Justice). Given this deference it is clear that the decision below should be affirmed, since the circuit's assessment is supported by ample evidence as already described.

D. The Habeas Corpus Doctrine Of Futility Is Inapplicable Here Because There Are No State-Federal Comity Concerns.

The government relies heavily on the Court's statement in *Engle* v. *Isaac*, 456 U.S. 107, 130 (1982), that the "futility of presenting an objection to the *state* courts cannot alone constitute cause for a failure to object" (emphasis added). Pet. Br. 11. Respondent, however, is on direct appeal from a federal conviction, not on habeas corpus from a state conviction. Thus she need not meet the demanding "cause and prejudice test." *See United States* v. *Frady*, 456 U.S. 152 (1982). The habeas test is strict, for it is designed to ensure that a defendant "may not bypass the state courts." *Engle*, 456 U.S. at 130. There is, after all, a strong interest in comity between state and federal systems which the "cause and prejudice" test promotes. As stated in *Engle*:

> [T]he Great Writ imposes special costs on our federal system. The States possess primary authority for defining

> and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders. . . .

Id. at 128; *cf. Rose* v. *Lundy*, 455 U.S. 509, 518 (1982) ("it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct an unconstitutional violation"). Because the comity concerns of *Engle* have no application to the case at bar, the quote from *Engle* is wholly inapplicable.

Although respondent need not meet the strict "cause" test, she arguably does so in any event. The government concedes that failure to raise a claim or object in the state trial court will be excused on habeas corpus in federal court if the claim was contrary to "a longstanding and widespread practice to which the Court has not spoken, but which a near unanimous body of lower court authority has expressly approved." Pet. Br. 23 (quoting *Reed*, 468 U.S. at 17). The instant case arguably falls within this exception because, as previously stated, at the time of respondent's trial, jury selection by a magistrate was "expressly" or implicitly approved by every court that had considered the matter.

E. Strong Policy Reasons Of Judicial Economy And Fairness To The Accused Support The Decision Below.

Judicial economy and the interests of justice strongly support application of the narrow futility exception to the facts of this case. The government's brief sets forth the justifications for the contemporaneous objection rule codified in Fed. Rule Crim. P. 51: judicial economy and fear of sandbagging. Neither of these goals is furthered, however, when an objection is futile, as the United States expressly admits in its brief. Pet. Br. 24. To the contrary, as in the instant case, those goals are actually frustrated.

It is true, as the government suggests, Pet. Br. 27, that the raising of an objection often promotes judicial economy by

leading the parties to a "compromise" which satisfies the defendant and avoids an appeal. Because of Hawaii's firmly entrenched policy, however, no compromise in the instant case was possible. Sandbagging is also not of concern where, as here, the failure to object was a result of futility. Furthermore, as previously mentioned, there was clearly no sandbagging because respondent did not even raise the magistrate issue on appeal until after *Gomez* was decided some two years after the trial.

In fact, judicial economy strongly militates in favor of not applying the contemporaneous objection rule in the case at bar. Forcing trial counsel to make a futile objection would needlessly cost time for the trial and appellate court to consider and reject the issue. As concisely summarized by the Ninth Circuit:

> [W]ere we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned, or out of fear that failure to object might subject counsel to a later charge of incompetency.

Scott, 425 F.2d at 57-58; *see also Ingber*, 841 F.2d at 454 ("Such a rule would encourage appeal of even well-settled points of law"); *Callanan*, 881 F.2d at 231 ("cause" requirement of *Frady* should not be applied in a way that would encourage counsel to relitigate well-settled point of law). In *Reed* this Court recognized the same point, albeit in justifying failure to raise arguments on direct appeal from a state conviction instead of at trial. There this Court approvingly quoted Judge Haynsworth's opinion in the court of appeals below, which feared that:

> counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be

> encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable.

Reed, 468 U.S. at 16 (quoting *Ross* v. *Reed*, 704 F.2d 705, 708 (4th Cir. 1983),*aff'd*, 468 U.S. 1 (1984)). The same logic applies to raising arguments at trial, as the Court has suggested in *Engle*, 456 U.S. at 131 (we should not "require trial counsel . . . to object to every aspect of the proceedings").

In fact, to force counsel to raise apparently futile objections, as in the instant case, would open the flood gates both at trial and on appeal to meritless claims because, in the words of Judge Haynsworth, counsel "would be obliged to raise and argue every conceivable constitutional claim no matter how far fetched." This consequence would greatly add to the workload of the already overburdened judiciary and would contravene one of the goals of the Rules of Criminal Procedure: the promotion of efficiency. *See* Fed. R. Crim. P.2.

Fairness and the interest of justice are the overreaching concerns of the Rules of Criminal Procedure. *Id.* These interests are advanced in the instant case by excusing counsel's failure to object. In all fairness, respondent should not be punished because her trial counsel could not foresee this Court's opinion in *Gomez*, which overruled the prevailing law in the Ninth Circuit. As Judge Minor wrote in *Ingber*: "Were we to penalize Ingber for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court." *Ingber*, 841 F.2d at 454. In holding that respondent should not be penalized for her counsel's failure to "guess that the law would change some time after the error was committed," Pet. App. 10a, 11a, the Ninth Circuit simply affirmed that trial counsel need not have "extraordinary vision." *Hopkinson* v. *Shillinger*, 888 F.2d 1286, 1289 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 3256 (1990) (quoting *Engle*, 456 U.S. at 131); *see Pierce Packing Co.* v. *John Morrell*, 633 F.2d 1362, 1365 (9th Cir. 1980) ("a party should not be penalized for failing to anticipate a change in the controlling law").

Penalizing respondent for not objecting would be unfair in another respect. This Court has recently held that state courts

are entitled to rely in good faith on existing federal precedent and should not suffer from a subsequent change in federal law. *Butler* v. *McKellar*, 110 S. Ct. 1212, 1217 (1990) (citing *United States* v. *Leon*, 468 U.S. 897, 918-919 (1984)). Just as courts and law enforcement officers are entitled to rely in good faith on existing precedent, so should respondent's trial counsel. When he, entirely reasonably, declined to press a claim which under existing precedent he "could well have thought . . . futile," *Byers*, 740 F.2d at 1109 n.6, his client should not suffer for his lack of "extraordinary vision."[13]

More generally, in the interests of justice the Ninth Circuit properly exercised its discretion to reach the issue on appeal notwithstanding respondent's failure to object. The circuits have also exercised this same discretion to relieve the govern-

---

[13] Petitioner has asserted that "hundreds of convictions" from across the country will be affected if the decision is affirmed. Reply Br. 4. Respondent has questioned, Resp. Opp. Cert. 13, 14, and continues to question the accuracy of this assertion. First, the decision below, along with the other circuits that have addressed the issue, holds that *Gomez* is retroactive only to federal cases on direct review at the time *Gomez* was decided. Pet. App. 8a. Thus, only cases on appeal within a narrow time frame will be affected.

Second, and most importantly, *only* the Ninth Circuit, in light of its precedent, has applied the futility doctrine to a failure to object to a magistrate selecting the jury. Every other circuit that has addressed the issue has found no futility in light of the law prevailing in its circuit. In its reply brief seeking certiorari the government disputed this and asserts that the futility issue "will also affect a number of convictions in the Second Circuit." Reply Br. 3. In the same brief, however, the government implicitly contradicted its assertion by citing the most recent Second Circuit law which finds no futility in light of its prior precedent. Reply Br. 2 (citing *Musacchia*, 900 F.2d 493). Thus, the government's concerns are unfounded. In fact, even within the Ninth Circuit it appears that a relatively small percentage of cases will be affected, *see* Br. Opp. Cert. 13, which will consist primarily of the Hawaii cases specified in the government's brief for certiorari. Pet. App. 13a. Indeed, the affirmance here could well affect only the instant case and such few others where trial counsel, as here, had fruitlessly objected to the same magistrate in the past.

ment from its obligation under the contemporaneous objection rule. *See United States* v. *Hayden*, 860 F.2d 1483, 1485 (9th Cir. 1988) (even though government did not raise legal issue below court will decide it); *United States* v. *Bernhardt*, 840 F.2d 1441, 1445 (9th Cir.) (within court's supervisory powers to allow government to challenge magistrate's recommendation on appeal, even though it did not object below), *cert. denied*, 109 S. Ct. 389 (1988); *see also United States* v. *Miller*, 636 F.2d 850 (1st Cir. 1980) (government may raise standing issue on appeal although it did not object below); *United States* v. *Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981) (government's failure to object below to magistrate's recommendation is excused because new rule prohibiting appeal absent objection could not be anticipated).

Finally, it may well be true, as the government suggests, Pet. Br. 27, that a defense advocate must be willing to object even when he knows that the court will overrule his objection. Perhaps he must even object even when he knows that the court's anger will be aroused, or even that he might face sanctions. *See In Re Becraft*, 885 F.2d 547, 550 (9th Cir. 1989) (criminal defense lawyer fined $2,500 for filing frivolous petition for rehearing raising arguments repeatedly rejected by the court). Even the most vigorous advocate, however, might stop striking his head against a "solid wall," especially if he reasonably perceived at the time that what might break was not the wall, but his or his client's head. *Cf. Agee* v. *Lofton*, 287 F.2d 709, 710 (8th Cir. 1961) (counsel are "loath to challenge the propriety of a trial judge's utterances, for fear of antagonizing him and thereby prejudicing a client's case"). Thus, the judgment below should be affirmed.[14]

---

[14] By not arguing to the contrary, the government appears to concede that if objection was futile the Court of Appeals was correct in reversing the conviction. This concession is proper because, having found an objection futile, all courts treat the matter as if the objection had been made. Hence, reversal of the instant case follows automatically from *Gomez*.

II. EVEN IF OBJECTION WAS NOT FUTILE, THE CONTEMPORANEOUS OBJECTION RULE DOES NOT APPLY HERE BECAUSE THE ERROR WAS JURISDICTIONAL AND NOT SUBJECT TO WAIVER.

A. The Magistrate Had No Statutory Jurisdiction To Select The Jury In This Felony Case, And The Defect Was Not Waivable.

The Ninth Circuit reversed the conviction below on the alternative ground that the jurisdictional holding of *Gomez* created a "broad, definitive rule" not dependant on lack of objection. Pet. App. 9a. The Court of Appeals noted that in *Gomez* this Court had unanimously held that Congress withheld from magistrates jurisdiction to select a jury in a felony case. When the magistrate nevertheless did so, respondent was deprived of her "basic" right "to have all critical stages of criminal trial conducted by a person with jurisdiction to preside." Pet. App. 6a n.1 (quoting *Gomez*, 109 S. Ct. at 2248).

In holding that lack of objection below was irrelevant to raising a jurisdictional issue, the Court of Appeals implicitly followed the well-settled principle that lack of objection does "not waive" a jurisdictional error. *Insurance Corp. of Ireland* v. *Compagnie des Bauxites le Guinee*, 456 U.S. 694, 702 (1982); *see* Fed R. Crim. P. 12(b)(2) (jurisdictional errors may be raised any time). This is because the subject matter jurisdiction of the magistrate is limited to "those subjects encompassed within a statutory grant of jurisdiction." *Insurance Corp. of Ireland*, 456 U.S. at 701; *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 687 (1989). Obviously, respondent's failure to object below could not confer the subject matter jurisdiction on the magistrate that Congress withheld, for where there is no jurisdiction even the express consent of the respondent would be "irrelevant." *Id.* at 702; *see Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (even if parties concede jurisdiction, appellate court has special obligation to satisfy itself that lower court had jurisdiction). As succinctly stated by then-Justice Rehnquist, "parties may not confer jurisdiction . . . by stipulation." *California* v. *LaRue*, 409 U.S. 109, 113 n.3 (1972).

Therefore, in the instant case, there is "little difficulty" in concluding that the error here was jurisdictional and thus is "immunized from the general rule of waiver." *Government of the Virgin Islands* v. *Williams*, 892 F.2d 305, 309 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 2211 (1990).[15] Under *Gomez*, a magistrate simply "has no power to select a jury in a felony case with or without the defendant's consent." *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1546 (2d Cir. 1989) (Altimari, J., dissenting), *cert. denied*, 110 S. Ct. 1140 (1990).

The government argues that when this Court used the term "jurisdiction" in *Gomez*, as it did throughout its opinion, it did not really mean "jurisdiction." Pet. Br. 19, 20. Petitioner argues that this Court meant only that the district court had no "authority" to delegate jury selection to a magistrate. Pet. Br. 19. And the government contends that participation of the magistrate in the jury selection, albeit unauthorized, was not "so inconsistent with our shared notions of procedural regularity" as to void the judgment of conviction absent objection below. Pet. Br. 21.

This argument is flawed for two reasons. First, even if jurisdiction" meant "authority," the result is no different. Jurisdiction and power and authority are the same thing for these purposes. *See Bender*, 474 U.S. at 541; *Insurance Corp.*, 456 U.S. at 701-02. As applied here, respondent was still deprived

---

[15] Although the court in *Williams* excused the failure to object for purposes of review, it nevertheless erroneously held that, because of the lack of objection, there was no error. The court reasoned that "[n]o statute of which this Court is aware prohibits federal magistrates from conducting voir dire when a defendant consents." *Id.* at 310. This reasoning is erroneous, however, because in *Gomez* this Court held that Congress *withheld* jurisdiction from magistrates to select juries. Thus failure to object obviously cannot confer the jurisdiction that Congress has withheld, because "[i]n origin and design, federal courts are courts of limited jurisdiction. . . ." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 692 (1986) (Stevens, J., dissenting). Therefore, a magistrate can exercise "only the authority conferred on him by Art. III *and* by congressional enactments pursuant thereto." *Id.* (emphasis added).

of her right to have "lawful judicial authority" preside at her jury selection. *Burnham* v. *Superior Court of California*, 110 S. Ct. 2105, 2109 (1990) (Scalia, J.). Because jury selection, a critical part of respondent's felony trial, took place "before a person not [an authorized] judge . . . the proceeding was not a judicial proceeding." *Id.* Hence the jury was "not legitimate." *United States* v. *Lopez-Pena*, 890 F.2d at 500, Lexis 17515 at 30 (Aldridge, Senior Judge, dissenting). As a result, the jurisdictional defect in the instant case, which resulted in an illegitimate jury, must necessarily render the verdict void. *See Peters* v. *Kiff*, 407 U.S. 493, 502 (1972) ("Illegal and unconstitutional jury selection procedure cast doubt on the integrity of the whole judicial process").

Second, regardless of the terms used, the government has conceded that "even with the consent of the parties," a court could not delegate trial functions to a "panel of citizens." Pet. Br. 20, 21. Petitioner concedes that such a delegation would be a "flagrant departure from traditional procedure." *Id.* But to concede this is to concede that the "panel" has no jurisdiction to act, regardless of consent. If the ensuing judgment cannot stand when the judge delegates the trial function to the "panel," it likewise cannot stand when the judge delegates to the "panel" the process of jury selection, a critical part of that trial. Moreover, if delegation of jury selection to the "panel" voids the judgment, so does delegation to the magistrate, for "the magistrate was as much a legal stranger to the judicial process that determined the outcome of this proceeding as would have been a bystander called in from the street." *Archie* v. *Christian*, 808 F.2d 1132, 1138 (5th Cir. 1987) (en banc) (Clark, C.J.; dissenting).

In other words, "shared notions of procedural regularity" as well as Article III are violated by having the magistrate select the jury, because both require at a minimum that respondent have her jury selected by a competent court, not by a "panel of citizens" or by a magistrate. After all, competency of the tribunal has always been a bedrock element of procedure whose absence voids a judgment *ab initio*. *Burnham*, 110 S.Ct. at 2109. This ancient principle "traces back to the English Year

Books." *Id.*; *see McClaughry* v. *Deming*, 186 U.S. 49, 69 (1902) (where "the court was illegally constituted . . . [it] had no jurisdiction over the person of the defendant or the subject-matter of the charges against him. . . ."). Petitioner's suggestion that it is unfair or "unwise" that respondent gains a reversal even though she did not object to jurisdiction below, Pet. Br. 8, must also be rejected because when subject matter jurisdiction is lacking, even "principles of estoppel do not apply." *Insurance Corp. of Ireland*, 456 U.S. at 702. In short, because the jurisdiction rule "is inflexible and without exception," *id.*, the result in *France* is correct.

Relying on *United States* v. *Wey*, 895 F.2d 429, 431 (7th Cir.), *cert. denied*, 110 S.Ct. 3283 (1990), the government argues that because an Article III judge presided over the remainder of respondent's trial and entered the judgment of conviction, the conviction should stand. Pet. Br. 20 n.12. This argument, however, simply begs the question whether an Article III judge has jurisdiction to enter a valid judgment when the defendant was deprived of a competent judge at the critical stage of jury selection. By the government's logic an Article III judge could delegate to a "panel of citizens" or the magistrate the conduct of the whole trial; and, so long as he returned to enter the judgment, the proceeding would be lawful. This "trial," however, would surely be a "flagrant departure from traditional procedure" and a violation of our "shared notions of procedural regularity," because respondent was entitled to have a competent tribunal "in the first instance." *See Ward* v. *Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (availability of trial *de novo* irrelevant because petitioner entitled to unbiased judge "in the first instance," and no prejudice need be shown); *see also Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938) (presence of defense counsel is an "essential jurisdictional prerequisite" to a court's authority to convict a defendant, and the "court's jurisdiction at the beginning of the trial may be lost in the course of the proceedings [if counsel is not provided]"); *Matter of Hipp, Inc.*, 895 F.2d 1503, 1519 (5th Cir. 1990) ("The fact that the initial [bankruptcy] proceeding lacked a constitutionally competent adjudicator may . . . be fatal").

That the error at issue is a fundamental jurisdictional error which voids the conviction also follows from the Court's having

equated the error in having the magistrate select the jury to that in being deprived of an "impartial adjudicator, be it judge or jury." *Gomez*, 109 S. Ct. at 2248. Respondent has a constitutional right to an impartial judge. *Marshall* v. *Jerrico*, 446 U.S. 238, 242 (1980); *see Rose* v. *Clark*, 478 U.S. 570, 577 (1986) ("The state of course must provide a trial before an impartial judge"). When this right is violated, reversal follows regardless of lack of objection. *See Rocha* v. *Great American Insurance Co.*, 850 F.2d 1095, 1100 (6th Cir. 1988) (judge's prejudicial comments constituted "plain error"); *United States* v. *Lanham*, 416 F.2d 1140, 1143-44 (5th Cir. 1969) (judge's taking over the prosecution by examining witnesses was "plain error"). Therefore, just as in the case of a biased judge, reversal also follows when a magistrate selects the jury, and the decision below should be affirmed.

B. Respondent Was Deprived Of Her Non-Waivable Right To Have An Article III Judge Preside At Jury Selection.

In addition to having a person without jurisdiction preside at jury selection, respondent was deprived of her right to have an Article III judge preside at jury selection, a critical stage of her felony trial. This was a jurisdictional error of the first magnitude because criminal matters are at the "protected core" of Article III. *Northern Pipeline Construction* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 n.25 (1982); *see Schor*, 478 U.S. at 853 (the "core" or "ordinary powers of the district courts" include "presid[ing] over jury trials or issu[ing] writs of habeas corpus"); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 606 (1962) (Douglas, J., dissenting) (Article III judges, not others, are chosen for their qualifications to sit in cases involving the "vast interests" of life and liberty).[16] Obviously, the right to an Arti-

---

[16] Generally speaking, a litigant in a civil case has a constitutional right to have an Article III Judge preside at trial. *Commodity Future Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986); *see Pacemaker Diagnostic Clinic of America* v. *Instromedix*, 725 F.2d 537, 541 (9th Cir.) (en banc) (opinion by now-Justice Kennedy) (subject to certain exceptions, a litigant has a "personal right . . . to demand Article III adjudication of a civil suit"), *cert. denied*, 469 U.S. 824 (1984). In a civil case this constitutional right may be waived. *Schor*, 478 U.S. at 849.

cle III judge must also be guaranteed at jury selection, a critical stage of the felony trial.

To be sure, even in a criminal case a non-Article III officer may preside over a pretrial matter like a suppression hearing. *United States* v. *Raddatz*, 447 U.S. 667, 678-79 (1980). But jury selection is not a pretrial matter, but rather, as this Court unanimously held in *Gomez*, a "critical stage[] of a criminal trial" itself. *Gomez*, 109 S. Ct. at 2248. Hence to have a magistrate preside at jury selection was to deny respondent her constitutional right to an Article III judge.

The right to have an Article III judge at jury selection also arises from the right to a jury trial itself, guaranteed by both Article III, § 2, cl. 3 and the Sixth Amendment.[17] Indeed, that the guarantee to a jury trial was placed within Article III, even before the Sixth Amendment was ratified, suggests that the Framers envisioned that a lawful and duly constituted "jury" presupposes and necessitates an Article III judge in superintendence. Thus, the Court has said that "trial by jury . . . in the American Constitutions is not merely a trial by a jury of twelve men before an officer vested with [certain] authority . . . but it is a trial by a jury of twelve men, *in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts*. . . ." *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-14 (1899) (emphasis added). Respondent contends, therefore, that to be legitimately constituted under Article III, a jury must necessarily be "under the constant superintendence of the [Article III] trial judge." *Crowell* v. *Benson*, 285 U.S. 22, 61 (1932). If the Article III

[17] Article III, § 2, cl. 3 provides in pertinent part that "The Trial of all Crimes . . . shall be by Jury." The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." The right of trial by jury is the most "priceless" safeguard to individual liberty. *Irvin* v. *Dowd*, 366 U.S. 717, 721 (1961). It is "so important to liberty of the individual that it appears in two parts of the Constitution," Article III itself and the Sixth Amendment. *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 16 (1955).

right to a jury trial necessarily includes the right to have an Article III judge preside at that trial, it follows that an Article III judge must also preside at jury selection, a "critical" stage of the trial. *Gomez*, 109 S. Ct. 2248.[18]

Assuming the Court accepts the conclusion that respondent had a right to have an Article III judge preside at jury selection, the right was not waivable because it is a jurisdictional and "structural" right that underlies Article III. *Cf. Schor*, 478 U.S. at 850-51. To be sure, in a civil case a litigant can waive his personal right to an Article III judge if he does so knowingly and voluntarily. *Id.* Even in a criminal case a defendant can waive his right to a lawyer, to a trial by jury, or, by pleading guilty, to any trial at all. It does not follow, however, that having elected a jury trial, respondent can then waive her right to have

[18] If, as argued earlier, an Article III judge could assign jury selection to a magistrate then the judge could assign him other critical trial functions as well. This could not have been the Framers' intention under Article III. As Blackstone wrote long ago, when speaking of the dangers of "new" procedures more "convenient" than the jury trial,

> the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate, not only from all open attacks . . . [but from] new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue and courts of conscience. And however *convenient* these may appear at first . . . yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price free nations must pay for their liberty in more substantial matters . . . and that, though begun in trifles, the precedent may gradually increase and spread. . . .

4 W. Blackstone, *Commentaries on the Laws of England*, Ch. 27, 343-344 (Legal Classics Library, 1983 reprint of 1769 ed.) (emphasis in original). The Court has adopted Blackstone's philosophy and has said that "the fact that a . . . procedure is efficient, convenient, and useful . . . will not save it if it is contrary to the Constitution." *Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986) (quoting *INS* v. *Chadha*, 462 U.S. 919, 944 (1983)). Therefore, as applied to the instant case, the "new" method of jury selection by a magistrate, however convenient or useful, undermines the right to trial by jury, guaranteed by both Article III and the Sixth Amendment, and it cannot constitutionally be countenanced.

an Article III judge preside at a critical stage of that trial, because there is a paramount structural interest underlying Article III that is simply beyond her power to waive. *Cf. Wheat* v. *United States*, 486 U.S. 153, 160 (1988) (defendant may not waive her right to conflict free defense counsel because "federal courts have an independent interest in ensuring . . . that legal proceedings appear fair to all who observe them").

This Court has stated that a litigant cannot waive the "structural" protection that underlies Article III because it is "an inseparable element of the constitutional system of checks and balances." *Schor*, 478 U.S. at 850 (quoting *Northern Pipeline*, 458 U.S. at 58). The Court observed that "[t]o the extent this structural principle is implicated in a given case" the parties cannot waive the defect "for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2." *Schor*, 478 U.S. at 850-51. Although the Court was speaking in the context of congressional attempts to undermine Article III Courts, the Court's concerns speak with equal force to a district court's efforts to strip itself of authority by delegating critical criminal trial functions to a "panel of citizens" or a magistrate. This is so because the Framers "intended to safeguard the people of this country from punishment without trial by duly constituted courts." *Glidden Co.*, 370 U.S. at 601 (Douglas J., dissenting) (quoting *United States* v. *Lovett*, 328 U.S. 303, 317 (1946)); *cf. People* v. *Ahmed*, 66 N.Y.2d 307, 311, 487 N.E.2d 984, 986, (1985) (conviction reversed where trial judge delegated duty of answering juror's questions to his legal secretary even though defendant consented, because right to jury trial impaired).

There is, moreover, a "powerful and independent constitutional interest in fair adjudicative procedure." *Marshall* v. *Jerrico*, 446 U.S. at 243. This interest is promoted by Article III adjudication and is at its strongest in a felony trial. In fact, respondent contends that without the basic, structural protection of an impartial Article III judge presiding over all critical stages of a felony trial "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence."

Rose v. *Clark*, 478 U.S. at 577-578; *see Glidden Co.*, 370 U.S. at 601.

The government itself once took a similar view with respect to the magistrate's subject matter jurisdiction over misdemeanor offenses. In speaking against the constitutionality of the Magistrates Act of 1968 which authorized magistrates to try misdemeanors upon consent of the defendant, Fred Vinson Jr., Assistant Attorney General in the Criminal Division of the Department of Justice, testified before Congress that the Department was of the opinion:

> that a waiver in this situation is a nullity. We are here concerned basically with subject matter jurisdiction which cannot be waived. Since Article III was designed to protect the interest of the public at large in the integrity of the judicial process, trial by an Article III judge is guaranteed and cannot be waived by an individual defendant . . . I might add that this infirmity would be subject to attack at any stage of the proceeding. . . .

Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 109 (1966); *see also* H.R. Rep. No. 1629, July 3, 1968, *reprinted in* 1968 U.S. Code Cong. & Admin. News 4264 (summarizing Mr. Vinson's views). The government's argument applies with even more force to a defendant's attempt to waive her right to an Article III judge at a "critical" stage of a felony trial.

In sum, where, as in the instant case, Article III limitations are at issue, "notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Schor*, 478 U.S. at 851. Thus respondent could not waive her right to have an Article III judge preside at jury selection, and the decision below should be affirmed.[19]

---

[19] As argued in part IV of this brief, even assuming, *arguendo*, that respondent's Article III right could be waived, at the very least a knowing and express waiver from respondent herself was necessary. Failure of counsel to object is not sufficient.

III. THE CONTEMPORANEOUS OBJECTION RULE DOES NOT APPLY HERE BECAUSE THE ERROR WAS "PLAIN."

The opinion below should also be affirmed on the basis that the error at issue is "plain."[20] Of course, the "plain error" exception is narrow and only to be used sparingly. Nevertheless, as the government concedes, it is applicable to an error that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Pet. Br. 14 (citing *United States* v. *Young*, 470 U.S. 1, 15 (1985)). The instant case falls precisely within this doctrine because as previously stated "illegal" jury selection procedures "cast doubt on the integrity of the judicial process," *Peters* v. *Kiff*, 407 U.S. at 502, and "[i]mproper jury selection can undermine pubic confidence in the judicial process." *United States* v. *Trice*, 864 F.2d 1421, 1427 (8th Cir. 1988), *cert. dismissed*, 109 S. Ct. 3206 (1989).

In the instant case the unauthorized delegation of jury selection to a magistrate may well have devalued if not "demean[ed]" the process of jury selection in the jury's eyes. *Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting). As recently stated by the Seventh Circuit, even a civil trial is "diminished" when a magistrate selects the jury. *Olympia Hotels Corp.* v. *Johnson Wax*, slip. op. No. 89-2350 (July 20, 1990), WL 100325, 12. Moreover, an Article III judge "helps impress on the jurors the gravity of their mission" in ways that a magistrate cannot. *Id.* Because an Article III Judge did not preside over jury selection, a critical

[20] The government mistakenly contends that in respondent's opposition to the petition for certiorari, she "eschewed all reliance on plain error doctrine," Pet. Br. 14, and that she "abandoned" that issue. Pet. Cert. Reply 4. It is true that in her opposition respondent did argue, albeit unsuccessfully, that certiorari was not justified to decide the "plain error" issue because *France* did not discuss it. She never asserted, however, that were certiorari to be granted, she would not rely on the "plain error" doctrine to affirm the judgment. Having now granted certiorari, this Court may affirm the decision below on any basis discussed in the record. *Boag*, 454 U.S. at 367 (Rehnquist, J., dissenting); *United States* v. *New York Telephone*, 434 U.S. 159, 166 n.8 (1977).

stage of respondent's trial, jury selection was simply "not legitimate." *Lopez-Pena*, 890 F.2d at 500, Lexis 17515 at 30 (Aldridge, Senior Judge, dissenting). Hence, the error was "plain." *Cf. United States* v. *Miller*, 468 F.2d 1041, 1044-45 (4th Cir. 1972) ("plain error" for magistrate to conduct a misdemeanor trial without the defendant's written consent, in violation of 18 U.S.C. § 3401(b) because error impaired right to trial by jury), *cert. denied*, 410 U.S. 935 (1973).

Most importantly, as previously noted, the government concedes that it would be "plain error" for a court to delegate to "a panel of citizens" the conduct of a trial even if a defendant consented. Pet. Br. 20. Presumably, even were this "panel of citizens" to conduct an exemplary trial, without a trace of error, "plain error" would still occur because, as the government acknowledges, such a "trial" would compromise the "integrity of public reputation of the judicial process" and would be a "flagrant departure" from traditional procedures. Pet. Br. 20. Consequently, if it is "plain error" for a "panel" to preside over a felony trial, it must also be plain error for the "panel" to preside over jury selection, a critical part of that trial. And if delegation to the "panel" is a "flagrant violation" of procedural norms, so must the delegation to a magistrate, for both delegations are equally unauthorized.

Moreover, contrary to the government's argument, respondent need not demonstrate that the error had a "demonstrable effect on the verdict." Pet. Br. 16. Just as no effect on the verdict need be shown when jury selection is presided over by the "panel," none need be shown here. Notwithstanding lack of objection, prejudice should be presumed from the basic structural error of "hav[ing] [a] critical stage[] of a criminal trial conducted by a person without jurisdiction to preside." *Gomez*, 109 S. Ct. at 2248. Such a presumption is particularly appropriate when jury selection is at issue, for "who decides the truth from the evidence may be as important as the evidence" itself. *United States* v. *Ford*, 824 F.2d 1430, 1438 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988). Hence an illegitimate jury selection process inevitably skews the truthfinding func-

tion of the trial.[21] *See Gomez*, 109 S. Ct. at 2247 ("the atmosphere of the *voir dire* . . . may persist throughout the trial").

Furthermore, as previously stated in *Gomez*, the Court unanimously equated the error in having a magistrate preside over jury selection to that in having a biased judge. *Id.* at 2248. Regardless of lack of objection, trial before a biased judge is "plain error." *See Rocha*, 850 F.2d at 1100 (judge's prejudicial comments constituted "plain error"). Just as no "demonstrable effect on the verdict" need be shown where the judge is prejudiced, no effect need be shown when an equally serious error occurs: having a person without jurisdiction preside at jury selection.[22]

In the instant case, as previously noted, "the effect of the violation cannot be ascertained." *See Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (discrimination in selection of grand jury).

---

[21] To be sure, in the ordinary case involving only an evidentiary error, as in *United States* v. *Young*, or an erroneous jury instruction, as in *United States* v. *Frady*, 456 U.S. 152 (1982), the defendant must show a prejudicial impact on the jury. Neither of these cases is applicable, however, because as argued above, the error here is jurisdictional or structural. In neither event is a showing of actual prejudice required. Alternatively, prejudice is presumed because the effect on the jury is "impossible" to ascertain. *Olympia Hotels Corp.*, WL 100325 at 14; *cf. Young* v. *Vuitton et Fils S.A.*, 481 U.S. 787, 809-811 (1987) (plurality opinion) (appointment of financially interested prosecutor creates appearance of impropriety with effects that are "difficult to assess"); *Strickland* v. *Washington*, 466 U.S. 668, 693 (1984) (where defense counsel burdened by actual conflict "prejudice is presumed" because it is "difficult to measure").

[22] It is true that none of the few circuits that have addressed the issue have found "plain error." *See* cases cited in Pet. Br. 14 n.8. The reasoning of each of these cases is unpersuasive, however, because none had the benefit of the government's concession here. Moreover, none considered the true magnitude of the jurisdictional and structural error, and the extent to which the integrity of the trial was impaired. Finally, none addressed this Court's having equated the error to that in having a biased judge or jury.

For example, the Court can never know the extent to which the seriousness of jury selection and the "gravity of [the jury's] mission," *Olympia Hotels Corp.*, WL 100325 at 12, was devalued in the jury's eyes by having a non-Article III Judge preside. As a result, the Court cannot know the extent to which the prospective jurors may not have taken seriously their responsibility to answer voir dire questions candidly and fully. These important questions included whether the jurors could be fair to both sides, J.A. 30-34, 37, and whether they could hold the government to its burden of proof. J.A. 29. Nor can the Court know the effect of the magistrate's refusal to ask Cassiday's question concerning Vietnam War veterans, a question that an Article III Judge would surely have posed. Because the facts in the case at bar were close and lent themselves to "starkly disparate conclusions," *France*, Pet. App. 2a, and because the effect on the jury of having a non-Article III judge preside is "impossible" to determine, *Olympia Hotels Corp.*, WL 100325 at 14, the error was "plain" and the decision below should be affirmed.

IV. COUNSEL'S FAILURE TO OBJECT DID NOT CONSTITUTE RESPONDENT'S KNOWING AND EXPRESS CONSENT TO WAIVE HER BASIC RIGHT TO HAVE HER JURY SELECTED BY AN ARTICLE III JUDGE.

Assuming, *arguendo*, that respondent could consent to an unauthorized person presiding over her jury selection, this consent would be valid only if respondent were first informed of her right to have an Article III judge conduct the jury selection and then only if she personally communicated her consent to the court. Because neither condition obtained in the instant case, there was no valid waiver.

A. The Reasoning of *Gomez* And The Intent Of Congress Require Respondent's Knowing And Express Consent As A Prerequisite To A Valid Waiver.

This conclusion follows from the repeated emphasis the Court in *Gomez* placed on the importance of consent. Indeed, the Court framed the very issue in *Gomez* as whether "presiding at the selection of a jury in a felony trial without the

defendant's consent" was proper. *Gomez*, 109 S. Ct. at 2239 (emphasis added). Moreover, the Court stressed that "a critical limitation on [a magistrate's] jurisdiction is consent." *Id.* at 2244. The Court relied heavily upon legislative history establishing that Congress had adopted a careful consent procedure as a prerequisite to the exercise by magistrates of trial jurisdiction "in the interests of policy as well as constitutional constraints . . . ." *Id.* at 2245 & n.24. Finally, the Court observed that Congress expressly provided in 18 U.S.C. § 3401(b) that a magistrate's misdemeanor trial jurisdiction was limited to the case where the defendant gave his personal consent in writing and then only after the magistrate had "carefully explain[ed]" his right to a trial before a district court judge. *Gomez*, 109 S. Ct. at 2244 & n.21; *see United States* v. *Marcyes*, 557 F.2d 1361, 1367 (9th Cir. 1977) (absent clear explanation of defendant's right to trial before an Article III judge, defendant's written consent invalid).[23]

The legislative history of 18 U.S.C. § 3401(b) underscores the Court's concern. During extensive floor debate on this statute in the House, Representative Poff, as noted in *Gomez*, stressed "[t]he intricate safeguards, the constitutional warnings, the statutory explanations, the written waivers and written elections required before the magistrate may exercise his trial jurisdiction in the individual case . . . ." *Gomez*, 109 S. Ct. at 2245 n.24 (quoting 114 Cong. Rec. H27342 (Sept. 18, 1968)).

Moreover, in response to the Justice Department's initial attack on the constitutionality of the statute, Senator Tydings reiterated the importance of consent as follows:

> The act emphasizes the signal importance of *knowledgeable waiver* by the accused of his right to jury trial before the district court. The magistrate is required by the terms

[23] 18 U.S.C. § 3401(b) provides that, in a misdemeanor case, "The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court. . . . The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court."

> of the act to give the defendant a careful explanation of the right to elect trial in the district court, and of his possible right to demand jury trial in that court.
>
> The U.S. magistrate is forbidden to proceed to trial unless the defendant, *having heard the magistrate's explanation*, executes a written election of trial before his magistrate and a written waiver of whatever jury trial right he has.

Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 2d Sess. 73 (1968) (emphasis added). Similarly, in the report of the House Committee on the Judiciary to the full House, the Committee also elaborated on the consent requirement as follows:

> It should be noted that the Supreme Court has defined a waiver of rights under the Constitution as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). In order for a waiver of a constitutional right to occur, "a knowing and intelligent waiver" is necessary. *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). Subsection (b), by requiring that the magistrate "carefully" explain the right to trial before a district judge and the right to jury trial before the district judge or the magistrate, incorporates this case law. It also requires that the record show that the accused intelligently and understandably rejected the offer, for "anything less is not waiver." *Carnley* v. *Cochran*, 369 U.S. 506 (1962). In this regard, waiver of the right to be tried by the district court is a critical stage of the proceedings requiring the presence and advice of counsel, unless also waived.

H.R. Rep. No. 96-287, 96th Cong, 1st Sess. 18.

Because of the clear Congressional intent to ensure knowing and voluntary consent to a magistrate trial jurisdiction, the circuit courts have adhered to the strict consent procedure, and many have said that without the rigid requirements set forth in the statute, the statute would be unconstitutional.[24] Almost

[24] *See United States* v. *Byers*, 730 F.2d 568, 570 (9th Cir.) (without written consent of defendant, having magistrate preside over trial would be unconstitutional), *cert. denied*, 469 U.S. 934 (1984); *United*

identical consent procedures are required for a magistrate to preside at civil trials. Thus 28 U.S.C. § 636 (c)(1) provides that the litigant's consent must be "express" and "on the record." *Lovelace* v. *Dall*, 820 F.2d 223, 226 (7th Cir. 1987). As noted by one court, "Congress passed both provisions together . . . [b]oth require the voluntary written consent of the parties . . . ." *Byers*, 730 F.2d at 570. Just as it did with misdemeanor trials, Congress felt so strongly about the consent issue in civil trial that it insisted that the rules of court "must include procedures to protect the voluntariness, knowingness, and willingness of the consent." H.R. Conf. Rep. No. 96-444, 96th Cong., 1st Sess. 8, *reprinted in* 1979 U.S. Code Cong. & Adm. News 1489. For that reason 28 U.S.C. § 636(c)(5) emphasizes the need for voluntary consent free from coercion.[25]

Moreover, courts that have addressed the issue hold that for the statute authorizing magistrates to preside at a civil trial to pass constitutional muster, consent to the magistrate's role must be "clear" and "unambiguous." *Lovelace* v. *Dall*, 820 F.2d at 225 (quoting *Adams* v. *Heckler*, 794 F.2d 303, 306-07 (7th Cir. 1986)). The courts have reasoned that "without such safeguards" as voluntary, written consent, Congress was concerned that the act would "violate the constitutional

---

States v. *Dobey*, 751 F.2d 1140 (10th Cir.) (where defendant knowingly and expressly consented to trial before magistrate, conviction did not violate Article III), *cert. denied*, 474 U.S. 818 (1985); *United States* v. *Robinson*, 495 F.2d 30, 34 (4th Cir. 1974) (magistrate proceedings were deficient because "[t]he record contain[ed] no written consent by Robinson to be tried before the magistrate"); *United States* v. *Ferguson*, 778 F.2d 1017, 1019 (4th Cir. 1985) (because defendant consented pursuant to the statute, magistrate presiding over trial not unconstitutional), *cert. denied*, 476 U.S. 1123 (1986).

[25] The Federal Magistrates Act commands that the consent of the parties "shall be communicated to the clerk of the court" in order for a magistrate to preside at a civil trial. 28 U.S.C. § 636(c)(2). Moreover, this consent must be obtained via informative court procedure: "[T]he clerk of court shall . . . notify the parties of their right to consent to the exercise of such jurisdiction." *Id.* Procedures are even provided to "protect the voluntariness of the parties' consent." *Id.*

requirement that the judicial power of the United States must be vested in Article III courts. S. Rep. No. 74 at 4, U.S. Code Cong. & Admin. News 1979, p. 1472." *Fowler* v. *Jones*, 899 F.2d 1088, 1093 (11th Cir. 1990). Thus, "valid consent is the linchpin of the constitutionality of 28 U.S.C. § 636(c)." *Id.* at 1093 (quoting *Adams* v. *Heckler*, 794 F.2d at 307). Therefore, mere failure to object by counsel, as in the instant case, cannot suffice to constitute the necessary knowing consent of respondent because "failure to object . . . is no substitute for the express consent required." *Id.* at 1093. On the contrary, such consent must be "explicit and cannot be inferred from the conduct of the parties." *Lovelace*, 820 F.2d at 225 (quoting *Heckler*, 794 F.2d at 307); *see Alaniz*, 690 F.2d at 720 ("We will not permit our jurisdiction to depend on inferences").[26]

Just as failure of counsel to object to the magistrate's jurisdiction does not constitute the requisite consent in a civil or misdemeanor trial, it can hardly constitute such consent in the far more critical matter of jury selection at a felony trial. Indeed, the Court unanimously observed in *Gomez* that "the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent." *Gomez*, 109 S. Ct. at 2245. In sum, the reasoning of *Gomez*, the clear intent of Congress, and the overwhelming case law dictate that any consent to the magistrate's presiding at jury selection must at a minimum

---

[26] *See also Geaney* v. *Carlson*, 776 F.2d 140, 142 (7th Cir. 1985) ("Because of constitutional overtones, courts are reluctant to imply consent to the magistrate's authority from a party's conduct"); *Ambrose* v. *Welch*, 729 F.2d 1084, 1085 (6th Cir. 1984) ("We decline to view the party's conduct throughout the proceedings as supplying the necessary consent"). In recently reversing a civil judgment because written consent to a magistrate was lacking, the Fifth Circuit concisely stated that "[w]ritten consent is an important means of safeguarding consent . . . [and] assuring the voluntariness of consent is of fundamental importance since parties consenting to trial before a magistrate are, in effect, waiving their right to trial before an Article III judge." *Murret* v. *City of Kenner*, 894 F.2d 693, 695 (5th Cir. 1990).

have been knowingly and expressly given by the respondent.[27] Because a failure to object cannot constitute such "clear and unambiguous" consent by respondent, the judgment should be affirmed.

B. Because A Constitutional Or Fundamental Right Is At Issue, Personal Consent Is Required.

Strict waiver requirements are also appropriate because, as respondent has argued in part II B, a fundamental constitutional right under Article III is at issue here. The right to an Article III judge "involves [such] important constitutional rights," *United States* v. *Mortensen*, 860 F.2d 948, 950 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1935 (1989), that it merits at least the same protection afforded the right to counsel and to a jury trial. *See Schor*, 478 U.S. at 848-49; *Pacemaker*, 725 F.2d at 541, 543 (right to an Article III judge is "personal" and must be freely and voluntarily waived) (Kennedy, J.). The government always has the burden of establishing valid waivers of constitutional rights, *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986), and that burden is never satisfied by a silent record or the defendant's inaction. *Id.*; *Carnley* v. *Cochran*, 369 U.S. 506, 515 (1962); *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *Barker* v. *Wingo*, 407 U.S. 514, 526 n.25 (1972) (waiver of speedy trial right not presumed from inaction of defendant). In fact, courts "indulge in every reasonable presumption against

---

[27] Apart from the Magistrates Act, Fed. R. Crim. P. 23(a) provides that any jury trial waiver must be by the defendant and must be "in writing." This rule is even stricter than the constitutional standard which requires only an "express, intelligent consent." *See Adams* v. *United States*, 317 U.S. 269, 277 (1942); *Patton* v. *United States*, 281 U.S. 276, 312 (1930). As argued above in part II B, at least in federal court a valid jury trial presupposes an Article III judge in "constant superintendence," *Crowell*, 285 U.S. at 61, including selecting the jury in the first place. Therefore, Rule 23(a) can be read to require a written waiver of the right to have an authorized judge preside at jury selection. Because no such written waiver exists in the instant case, respondent's waiver of her right was invalid.

waiver" of constitutional rights. *E.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 404 (1977).

For example, with respect to waiver of a jury trial, a district judge must take "special pains" to "impress upon the defendant" personally the significance of his choice, to ensure the waiver is "knowing and voluntary." *United States* v. *Lyons*, 898 F.2d 210, 215 (1st Cir.), *petition for cert. filed* July 20, 1990. No less a procedure was required in the case at bar, and because it did not occur there was no valid waiver. Moreover, as argued by respondent in part II B, the right at issue is not only personal, it is "structural" because it relates to the integrity and structure of the criminal justice system. *See Schor*, 478 U.S. at 850-51. As with other such structural rights, assuming they can be waived at all, express and knowing consent is required.

Even assuming, *arguendo*, that the right at issue is not constitutional, *Gomez* did categorize the right to have an Article III judge preside at jury selection as one of "those basic fair trial rights that can never be treated as harmless." *Gomez*, 109 S. Ct. at 2248. The class of such "basic" rights is quite small and includes the constitutional right to counsel and the constitutional right to an impartial judge. *See Chapman* v. *California*, 386 U.S. 18, 23 n.8 (1967). Indeed, in *Gomez* the Court expressly equated the right at issue with that to an impartial judge. *Gomez*, 109 S. Ct. at 2248. With respect to such basic rights, this Court has always required a "strict standard of waiver." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 241 (1973).[28]

---

[28] The right to counsel, for example, may be waived only "knowingly and intelligently," *Faretta* v. *California*, 422 U.S. 806, 835 (1975) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464-65 (1938)), and the record must show that a defendant "knows what he is doing and his choice is made with his eyes open." *Faretta*, 422 U.S. at 835 (quoting *Adams*, 317 U.S. at 27a).

With respect to a defendant's right to an impartial judge, it is questionable whether such a "structural" right can be waived at all because "the requirement of neutrality has been jealously guarded by this Court." *Marshall* v. *Jerrico*, 446 U.S. at 242. Even assuming, *arguendo*, that it can, at least as strict a standard of waiver should obtain as with the right to counsel because the right to an unbiased judge is of equal if not greater importance. *See id.* at 242-43; *Ward*, 409 U.S. at 61-62.

To be sure, a defendant is frequently bound by his attorney's actions with respect to many trial rights. *See Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988). Nevertheless, as shown above, "there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of his client." *Id.* at 417-18. These rights include the fundamental, structural rights that go to the heart of the criminal justice system and that affect the key players in the system, the defense lawyer, the jury and the judge. Just as the defendant must give his personal and knowing consent to waive a trial, to waive a jury, or to waive a lawyer, he must also give his personal and knowing consent to waive an Article III judge at jury selection, a "critical" stage of his trial.

Applying the foregoing principles, it is clear that whether the right at issue is constitutional or not, Congress and this Court's precedent treat the right as fundamental and subject to a strict waiver standard. In the instant case this standard was not met. First, the record is utterly silent with respect to any explanation to respondent of her right to have an Article III judge conduct jury selection. Hence her "consent" was not knowing.[29] Second, the record discloses no express consent by respondent, and, as shown above, failure to object by respondent's counsel does not constitute such consent.

---

[29] In *Dobey*, the government conceded to the court that a waiver of a defendant's right to trial by an Article III judge is valid "provided" the defendant himself waived the right "knowingly and voluntarily." *Dobey*, 751 F.2d at 1142; *see United States* v. *Marcyes*, 557 F.2d 1361, 1367 (9th Cir. 1977) (absent clear explanation of his right to elect jury trial in district court, written consent to magistrate's jurisdiction invalid); *Miller*, 468 F.2d at 1043 (literal compliance with magistrate's duty under statute to explain defendant's rights is required to validate waiver thereof).

CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

MICHAEL R. LEVINE
(Appointed by this Court)
Federal Public Defender
District of Hawaii
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
Telephone: (808) 541-2521
Counsel for Respondent

(7)

No. 89-1363

Supreme Court, U.S.
FILED
AUG 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 1
Brasfield v. *United States*, 272 U.S. 448 (1926) 2
CFTC v. *Schor*, 478 U.S. 833 (1986) 14
Callanan v. *United States*, 881 F.2d 229 (6th Cir. 1989), cert. denied, 110 S. Ct. 1816 (1990) 3
Clyatt v. *United States*, 197 U.S. 207 (1905) 2
Cooter & Gell v. *Hartmax Corp.*, 110 S. Ct. 2447 (1990) 2
Crawford v. *United States*, 212 U.S. 183 (1909) 2
Crowell v. *Benson*, 285 U.S. 22 (1932) 13
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 10
Douglas v. *Alabama*, 380 U.S. 415 (1965) 4
Engle v. *Isaac*, 456 U.S. 107 (1982) 3, 4
Estelle v. *Williams*, 425 U.S. 501 (1976) 6, 17
Fay v. *Noia*, 372 U.S. 391 (1963) 3
Gomez v. *United States*, 109 S. Ct. 2237 (1989) 10
Grosso v. *United States*, 390 U.S. 62 (1968) 4
Hernandez v. *Beto*, 443 F.2d 634 (5th Cir.), cert. denied, 404 U.S. 897 (1971) 3
Ingber v. *Enzor*, 841 F.2d 450 (2d Cir. 1988) 3
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 3, 4
Leary v. *United States*, 395 U.S. 6 (1969) 4
Mahler v. *Eby*, 264 U.S. 32 (1924) 10
Martone v. *United States*, 435 F.2d 609 (1st Cir. 1970) 3
Murray v. *Carrier*, 477 U.S. 478 (1986) 10
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 13, 14
Osborne v. *Ohio*, 110 S. Ct. 1691 (1990) 4
Palmore v. *United States*, 411 U.S. 389 (1973) 12
Pavelic & Leflore v. *Marvel Entertainment Group*, 110 S. Ct. 456 (1989) 2
Reed v. *Ross*, 468 U.S. 1 (1984) 4
Schiavone v. *Fortune*, 477 U.S. 21 (1986) 2
Screws v. *United States*, 325 U.S. 91 (1945) 2
Smith v. *Estelle*, 602 F.2d 694 (5th Cir. 1979), aff'd, 451 U.S. 454 (1981) 3

Cases—Continued: Page

Swain v. *Pressley*, 430 U.S. 372 (1977) 12
Taylor v. *Illinois*, 484 U.S. 400 (1988) 17
United States v. *Frady*, 456 U.S. 152 (1982) 1, 10, 14
United States v. *Martinez-Torres*, No. 87-2006 (1st Cir. Aug. 20, 1990) 15
United States v. *Montalvo-Murillo*, 110 S. Ct. 2072 (1990) 11
United States v. *Raddatz*, 447 U.S. 667 (1980) 12, 13
United States v. *Sawyers*, 902 F.2d 1217 (6th Cir. 1990) 15
United States v. *Scott*, 425 F.2d 55 (9th Cir. 1970) 6
United States v. *Young*, 470 U.S. 1 (1985) 1, 10, 14
United States ex rel. O'Connor v. *New Jersey*, 405 F.2d 632 (3d Cir.), cert. denied, 395 U.S. 923 (1969) 3
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 3, 6
Wainwright v. *Witt*, 469 U.S. 412 (1985) 17
Weems v. *United States*, 217 U.S. 349 (1910) 2
Wiborg v. *United States*, 163 U.S. 632 (1896) 2, 10

Constitution, statutes, and rules:

U.S. Const.:
Art. III 11, 12, 13, 15, 16, 17
Amend. VI (Confrontation Clause) 4
28 U.S.C. 631 14
Fed. R. Crim. P.:
Rule 51 .....1, 2, 3, 5, 9
Rule 52(b) 1, 2, 3, 10, 14
Notes of Advisory Committee on Rules, 18 U.S.C. App. at 833 2
Fed. R. Evid. 103 9
Sup. Ct. R.:
Rule 27.6, 306 U.S. 708 (1939) 2
Rule 24.1(a) (1990) 2

Miscellaneous:

Annual Report of the Director of the Administrative Office of the United States Courts (1989) 12

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1363

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. a. Respondent's proposed "futility" exception has no support in the text of Fed. R. Crim. P. 51 and 52(b). Rule 51 requires a contemporaneous objection except where "a party has no opportunity to object." Rule 52(b) permits an appellate court to grant relief to a party who did not comply with Rule 51 if the alleged error is "plain," but Rule 52(b) contains no exception for cases of alleged futility.[1]

This Court has made clear that the Rules of Criminal Procedure are "in every pertinent respect * * * as binding as any statute duly enacted by Congress." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). The Rules are to be enforced according to their terms,

[1] Although Rule 52(b) is phrased in the disjunctive, the phrase "affecting substantial rights" applies to both "errors" and "defects," and the Rule "applies only to errors affecting substantial rights." *United States* v. *Young*, 470 U.S. 1, 15 n.12 (1985). See also *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982).

not treated simply as general, hortatory guides to the conduct of litigation. See *Cooter & Gell* v. *Hartmax Corp*,. 110 S. Ct. 2447, 2453 (1990); *Pavelic & Leflore* v. *Marvel Entertainment Group*, 110 S. Ct. 456, 458 (1989); *Schiavone* v. *Fortune*, 477 U.S. 21, 30 (1986). Because Rules 51 and 52(b) do not recognize a "futility" exception to the contemporaneous objection rule, there is no justification for creating such an exception, however reasonable such an innovation might seem to respondent. See *Pavelic & Leflore*, 110 S. Ct. at 460 ("Our task is to apply the text, not to improve upon it.").

Apart from abolishing the practice of noting "exceptions," Rules 51 and 52(b) were intended to adopt existing law. See Fed. R. Crim. P. 51 (contemporaneous objection required "for all purposes for which an exception has heretofore been necessary"); Fed. R. Crim. P. 52, Notes of Advisory Committee on Rules, 18 U.S.C. App. at 833 (1988) (Rule 52(b) "is a restatement of existing law"). The law in 1946, when Rules 51 and 52 were adopted, did not recognize a "futility" exception. Although this Court in several pre-1946 cases had excused the defendant's failure to note an exception to particular rulings, those cases all involved instances of "plain error,"[2] and the Court's authority to "notice a plain error not assigned or specified" was codified in this Court's Rules. Sup. Ct. R. 27.6, 306 U.S. 708 (1939) (current version at Sup. Ct. R. 24.1(a) (1990)). None of the "plain error" cases suggested, much less held, that

[2] See *Wiborg* v. *United States*, 163 U.S. 632, 658 (1896) (claim that there was no evidence to support the verdict); *Clyatt* v. *United States*, 197 U.S. 207, 221-222 (1905) (same); *Weems* v. *United States*, 217 U.S. 349, 362 (1910) (claim that a sentence constituted cruel and unusual punishment); *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926) (claim that the trial judge improperly asked the jury during deliberations for its numerical division); *Screws* v. *United States*, 325 U.S. 91, 107 (1945) (plurality opinion) (claim that the trial court omitted an essential element of the offense from the jury instructions). See also *Crawford* v. *United States*, 212 U.S. 183, 194 (1909).

a party's default should be excused when an alleged error was not "plain" (because it did not result in a miscarriage of justice), but the party nonetheless believed it would have been futile to take an exception.

Respondent relies on a series of decisions chiefly by the Second and Ninth Circuits that have excused defaults on futility grounds. Like respondent's argument in this Court, however, none of those cases made any attempt to reconcile the "futility exception" with Rules 51 and 52(b). Moreover, a number of the cases cited by respondent are habeas corpus cases in which the error was regarded as fundamental, and thus would likely have been treated as "plain error," not requiring objection, if the issue had arisen on direct appeal.[3] The habeas corpus cases provide no support for respondent's position in any event, because this Court in *Engle* v. *Isaac*, 456 U.S. 107 (1982), squarely held that the apparent "futility" of a constitutional claim is not a sufficient justification for a defendant's failure to raise that claim in the state court system.[4]

[3] See, *e.g.*, *Callanan* v. *United States*, 881 F.2d 229, 231 (6th Cir. 1989). cert. denied, 110 S. Ct. 1816 (1990); *Ingber* v. *Enzor*, 841 F.2d 450, 454-455 (2d Cir. 1988); *Martone* v. *United States*, 435 F.2d 609, 610-611 (1st Cir. 1970). Two of the cited cases excused a defendant's failure to object in part on the ground that the defendant did not make a knowing and intelligent waiver of his claim under the standard of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and *Fay* v. *Noia*, 372 U.S. 391 (1963). See *Hernandez* v. *Beto*, 443 F.2d 634, 637 (5th Cir.), cert. denied, 404 U.S. 897 (1971); *United States ex rel. O'Connor* v. *New Jersey*, 405 F.2d 632, 634 n.2 (3d Cir.), cert. denied, 395 U.S. 923 (1969). Those cases did not survive *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), and *Engle* v. *Isaac*, 456 U.S. 107 (1982).

[4] The decision in *Engle* undermines the Fifth Circuit's partial reliance on the futility doctrine in *Smith* v. *Estelle*, 602 F.2d 694, 708 n.19 (1979), aff'd, 451 U.S. 454 (1981). It is unnecessary to debate whether this Court's remark that it adopted "the reasons stated by the Court of Appeals," 451 U.S. at 468 n.12, can be read as an implicit acceptance of that rationale, because the following year the Court in *Engle* conclusively disposed of the issue by rejecting the "futility" doctrine in habeas corpus cases.

Contrary to respondent's claim, this Court has not recognized a futility exception. *Osborne* v. *Ohio*, 110 S. Ct. 1691 (1990), did not excuse a defendant's failure to raise a claim at trial. It held only that the defendant did not forfeit his claim by failing to ask for a jury instruction on an issue that he had already unsuccessfully raised in a pretrial motion to dismiss the charges. *Id.* at 1703-1705. In *Douglas* v. *Alabama*, 380 U.S. 415 (1965), the defendant raised his Confrontation Clause claim six times. Respondent refers to the statement that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection," 380 U.S. at 422, but that quotation is wrenched out of context. Read in context, *Douglas* held only that additional objections beyond the six already raised were unnecessary. *Id.* at 422-423.

Grosso v. *United States*, 390 U.S. 62 (1968), and *Leary* v. *United States*, 395 U.S. 6 (1969), like *Reed* v. *Ross*, 468 U.S. 1 (1984), adopted a novelty, not a futility, exception.[5] Moreover, language in the opinions referring to the defendants' "waiver" of their claims, *Grosso*, 390 U.S. at 71; *Leary*, 395 U.S. at 28, suggests that this Court believed that a defendant could forfeit a claim only by making a knowing and intelligent waiver under *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). That is no longer the law, however, as we explained in our opening brief (at 24 n.13).

---

[5] Respondent suggests that there is no principled distinction between a "novelty" exception and a "futility" exception to the contemporaneous exception rule. It is a sufficient answer to point out that in *Engle* v. *Isaac*, *supra*, this Court drew a clear distinction between the two: It held that "futility" does not establish cause for a failure to object, while expressly declining to decide whether the novelty of a constitutional claim can ever establish such cause. Compare 456 U.S. at 130 ("the futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial") with *id.* at 131 ("We need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object.").

b. Even if the Court were to create a "futility" exception, the exception should apply only where binding authority *required* the district court to deny the relief desired by the defendant; it should not apply where the circuit court authority merely *permitted* the district court to deny the requested relief. As we explained in our opening brief (at 24-26), the Ninth Circuit had previously held only that a magistrate *could* conduct voir dire, not that a magistrate *must* do so; district judges in Hawaii did not invariably assign jury selection to magistrates; and there was reason to believe that another court might disagree with the Ninth Circuit, as this Court later did in *Gomez*. Under these circumstances, respondent's failure to comply with Rule 51 should not be excused on grounds of futility, even if true futility could justify the failure to object in an appropriate case.

Contrary to respondent's contention (Br. 22-26), there is nothing unreasonable about requiring a defendant to object even when a particular custom or practice is settled in a particular district, as she submits was the case with magistrate-conducted voir dire in Hawaii. Even if an attorney reasonably believes that it is futile to raise a particular claim, it is still important to insist on a contemporaneous objection because it promotes candor, it gives the district judge an opportunity to reconsider its position on the matter, it avoids time-consuming difficulties in administering the contemporaneous objection rule, and it gives some indication to the reviewing court that the issue is one that mattered to the objecting party.

For tactical reasons, a defendant may prefer to have a magistrate, rather than a district judge, conduct voir dire. A particular magistrate may permit defense counsel to address or question the venire; the magistrate may conduct a more probing inquiry than a district judge; and the magistrate may be more willing than a district judge to grant for-cause challenges. When that is true, excusing a defendant's noncompliance with a contemporaneous objection rule allows the defendant to eat his

cake and have it too. The defendant enjoys the benefits of his preferred choice, while retaining a claim for appeal. See *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 (1976); *id.* at 515 (Powell, J., concurring).[6]

Respondent has overestimated the burden on the legal system from enforcing a contemporaneous objection rule even when an objection would be futile. If a claim is, in fact, foreclosed by "a solid wall of circuit court authority," *United States* v. *Scott*, 425 F.2d 55, 57 (9th Cir. 1970), it is a very simple matter for counsel to preserve his claim while candidly acknowledging that governing circuit precedent is to the contrary.

To require objection in the case of a ruling that the attorney believes has unfairly prejudiced his client does not, of course, mean that counsel should or must raise claims that he is convinced are frivolous. In the case of a contention that counsel knows neither the court of appeals nor this Court is likely to accept, it is entirely reasonable for counsel to forgo raising it, something that defense lawyers do as a matter of course with regard to dozens of rulings in every trial. Yet respondent seems to acknowledge that claims that have not been foreclosed by law in the defendant's own circuit are forfeited if not raised at trial, even if the attorney declined to raise the issue because he regarded it as hopeless. It would be quite odd to create a special exception to the contemporaneous objection rule for the small category of cases in which the issue had been resolved by a prior decision from the defendant's circuit, but not for cases in which the attorney abandoned the issue for other reasons, such as his lack of confidence in the merits of the argument.

[6] To be sure, a defendant who is confident that the court will deny his request to have the court conduct voir dire could lodge such a request without much fear that he would suffer the bad luck of having his request granted. Nonetheless, the risk that the request may be granted will make "sandbagging" less attractive than would be the case if defense counsel is allowed to raise the issue without having stated any objection at all in the district court. That interest is particularly important in a case such as this one, where it is not at all clear which side has benefited from the ruling in question, and where the defendant is therefore seeking reversal on the basis of an error that she may have been perfectly happy to have the district court commit.

c. A futility exception of the sort respondent proposes would inflict significant administrative costs on the criminal justice system by requiring the parties to engage in time-consuming debate about whether the prior decision seemed to foreclose the defendant's claim or simply make it difficult to win.[7] Moreover, the futility exception would raise difficult questions regarding the role of the attorney's state of mind in determining whether a particular claim should have been raised at trial.

The first question is whether the futility doctrine would apply even if the defense lawyer was unaware of the governing court of appeals precedent; that is, whether the failure to raise a point at trial would be excused on grounds of futility even if the lawyer who failed to raise the point had no idea that the claim had been rejected by the court of appeals. If the doctrine applied regardless of the defense counsel's knowledge of the pertinent precedents, the application of the exception would be entirely fortuitous in many cases, since it would excuse a failure to object when that failure was not based on a belief that the legal claim was futile, but was attributable to simple neglect on the part of the attorney. Yet if knowledge of the prior precedent must be established to make the futility exception applicable, it would make administration of the exception unmanageably cumbersome and subject to manipulation.

[7] This inquiry is difficult in part because it is based on a false premise. Litigation over the futility exception typically arises only when, as in this case, it turns out that the objection would not have been futile after all. The task then becomes to determine whether the defendant's miscalculation should be overlooked.

A second question would be whether the exception would apply if the lawyer believed the objection would be futile, but in fact the governing case law did not foreclose the objection. The lawyer may have misread the court of appeals' decision or, to take an extreme case, this Court may have just granted certiorari in the court of appeals case or overturned that case, and the lawyer may not have learned of that fact. To grant relief to a defendant, even in the absence of plain error, where his attorney failed to raise a point because he believed, incorrectly, that it would be futile to do so would open a huge and unmanageable exception to the contemporeneous objection rule. Lawyers would have to testify about their state of mind (with a premium placed on ignorance), and trial courts would have to make findings as to the lawyers' state of mind before an appellate court could determine whether a particular issue could be considered on appeal.

A third question raised by respondent's proposed rule is why there should be any special significance to a binding decision in the court of appeals. Portions of respondent's brief suggest that she declined to raise the issue of magistrate voir dire because the district court had clearly indicated that it would not conduct voir dire despite a defense request. Respondent's brief leaves it unclear whether that would be enough to trigger the "futility" exception, although the policies she cites in support of the exception (not requiring futile acts and not requiring defense counsel to burden or annoy the trial court) would seem to apply to such a case. Yet if the "futility" exception were applied that broadly, it would be applicable in a very large number of cases in which district courts have taken particular legal positions, but in which those legal positions may well turn out to be wrong. Just as there is no magic in a district court's consistent position on a legal question, there is no reason to treat as dispositive for all times a court of appeals' ruling on the issue, no matter how old that ruling may be, no matter how likely it may be to be reconsidered by that court, and no matter how vulnerable it may be to reversal by this Court. Lawyers who are sophisticated enough to be aware of circuit court precedent against them on a particular point also know that a court of appeals may change its mind, may find distinctions between seemingly indistinguishable cases, or may be corrected by this Court.

Respondent's labored effort to demonstrate why an objection would have been futile in this case is a powerful argument against creating a "futility" doctrine, and certainly against applying that doctrine in a case such as this one. Relying on the records of other cases and the prior experience of respondent's trial counsel, respondent seeks to show that even though the prior Ninth Circuit decisions did not in any way bar district courts from conducting jury selection, she should be excused for not objecting, because as a practical matter it was highly unlikely that the district court would agree to conduct jury selection in this case. There is no conceivable justification for a rule that would require such extensive exploration of the past conduct of the district court and the past experience of the defense lawyer, when that entire inquiry could be avoided by a simple, respectful objection of the sort required by Rule 51.[8]

---

[8] Respondent's reliance on her counsel's experience in prior cases raises the question whether the "futility" doctrine, as respondent conceives it, would be available if this case had been the first one in which her lawyer had encountered the practice of magistrate conducted voir dire. If the availability of the doctrine turned on the experience and awareness of defense counsel in each case, administering the "futility" doctrine would become hopelessly cumbersome.

For example, Rule 103 of the Federal Rules of Evidence requires an objection to all evidentiary rulings; respondent's "futility" theory would apply whenever (1) the court of appeals had previously treated a particular kind of ruling as discretionary; (2) a particular defense counsel believed a particular district judge would decide the issue against the defendant even if an objection were lodged; and (3) defense counsel had some relevant experience with

Finally, the failure to recognize a "futility" exception does not increase the risk that an innocent person will be convicted. The plain error rule, Fed. R. Crim. P. 52(b), like the doctrine of ineffective assistance of counsel, ensures that a lawyer's failure to assert a claim at trial does not lead to the conviction of an innocent defendant. Because "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986), it would be a "miscarriage of justice," *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982)), to permit an innocent person to be sent to prison simply because his counsel did not properly raise an objection at trial. Cf. *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986). The plain error rule was adopted to prevent such an occurrence. See *Wiborg* v. *United States*, 163 U.S. 632, 658 (1896). But there is no reason to excuse procedural defaults for errors that do not constitute "plain error" and thus do not entail unacceptable risks of an unjust result in a particular case.

2. Respondent next argues (Br. 27-35) that allowing a magistrate to conduct voir dire is a defect that a defendant *cannot* waive. In part, respondent relies on statements in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), that a magistrate lacks "jurisdiction" to conduct voir dire. As we explained in our opening brief (at 19-21), however, those statements refer to a magistrate's lack of "authority" to conduct voir dire; they do not answer the question whether that defect is waivable. See *Mahler* v. *Eby*, 264 U.S. 32, 43 (1924) (referring interchangeably to an agency's "jurisdiction" and "authority"). Not every violation of rules regulating the courts' authority to act renders the proceedings a nullity. Cf. *United States* v. *Montalvo-Murillo*, 110 S. Ct. 2072, 2077 (1990). The error that occurred here did not have that effect, since it was not so egregious as to undermine confidence in the ability of the federal criminal justice system accurately and fairly to adjudicate the charges against respondent. See U.S. Br. 20-21.

---

the district court to justify his belief. If an appellate court had to inquire into each of those matters before finding that a claim was forfeited, the contemporaneous objection rule would no longer serve its purpose of providing a simple means of focusing the attention of the parties and the reviewing court on those legal issues that the parties regarded as sufficiently important to preserve for appellate review.

a. *Gomez* held that the Magistrate's Act does not authorize a magistrate to preside over jury selection, and that where a defendant objects, magistrate-conducted voir dire requires reversal. But the fact that magistrates are not authorized to conduct voir dire does not mean that the judgments that arise from such trials are void or voidable, regardless of the defendant's consent or failure to object. Suppose a statute or Rule required that the judge who selects the jury must also try the case. In light of that provision, a judge who did not select the jury would be "unauthorized" to try the case; in the language of *Gomez*, he would lack "jurisdiction" to do so. But that certainly does not mean that in spite of the parties' consent or waiver, the judgment in such a case would be void. The statute or Rule would establish a right, and the defendant's consent or his failure to invoke that right would constitute a forfeiture, at least in the absence of plain error. The same analysis applies to respondent's statutory argument in this case.

b. Respondent next goes beyond the statutory analysis of *Gomez* and argues that Article III requires a district judge to preside over every aspect of a trial, including jury selection, and that a defendant in a criminal case may not waive his constitutional right to have an Article III judge preside over jury selection.

If respondent is correct in her view of the restrictions imposed by Article III on the use of magistrates, then far more is at stake than magistrate-conducted voir dire in felony jury trials. The authority of magistrates, on consent, to conduct misdemeanor trials or even to conduct voir dire in misdemeanor cases would be at risk, since

nothing in Article III distinguishes between misdemeanors and felonies. Moreover, while respondent concedes that the right to jury selection by an Article III judge may be waived in civil cases, Resp. Br. 31 n.16, 33, that is a concession of necessity, not of principle, since the Constitution does not create different rules for a court's participation in civil and criminal cases. Magistrates participate in or try a huge number of misdemeanor and civil cases each year,[9] so the consequences of accepting respondent's submission are quite significant. Those consequences need not be borne, however, because respondent's argument is flawed.

i. Article III imposes no rigid bar to the use of magistrates in criminal trials. As this Court has explained, "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts." *Swain* v. *Pressley*, 430 U.S. 372, 382-383 (1977); see *Palmore* v. *United States*, 411 U.S. 389, 402 (1973) ("Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III."). But even if defendants in all federal criminal cases brought in federal courts enjoy a constitutional right to a trial by an Article III judge, that does not mean that Article III grants them the right to have the judge conduct jury voir dire.

In *United States* v. *Raddatz*, 447 U.S. 667 (1980), this Court rejected an Article III challenge to a magistrate's authority to hear a suppression motion in a criminal case and to make proposed findings and recommendations to the district court concerning the proper disposition of the motion. The Court held that the delegation of suppression hearings to a magistrate "does not violate Art. III

[9] Between July 1, 1988, and June 30, 1989, magistrates tried 1385 non-petty misdemeanor cases and 1005 civil cases. *Annual Report of the Director of the Administrative Office of the United States Courts* 421, 440 (1989).

so long as the ultimate decision is made by the district court." 447 U.S. at 683. The Court emphasized that "the entire process takes place under the district court's total control and jurisdiction." *Id.* at 681. "[T]he magistrate acts subsidiary to and only in aid of the district court." *Ibid.* Justice Blackmun, concurring, emphasized that because the magistrate is subject to the control of an Article III court, "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." *Id.* at 685. Thus, whenever "a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct the errors." *Id.* at 686.

In light of *Raddatz*, a district court's decision to enlist a magistrate's aid in selecting the jury does not violate Article III. Here, as in *Raddatz*, the magistrate's actions were "subsidiary to and only in aid of" the court. 447 U.S. at 681. As in *Raddatz*, the Article III judge was available to review the magistrate's conduct of the voir dire and make the "ultimate decision" whether an impartial jury had been selected. *Id.* at 683. Thus, the district court retained "the essential attributes" of judicial power. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982) (plurality opinion) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932)).[10]

ii. Even if the use of a magistrate to conduct jury selection violates a defendant's right to have an Article III judge conduct that procedure, that does not mean the

[10] Article III clearly does not prohibit the familiar practice of delegating to jury commissioners or personnel in the clerk's office the task of selecting members of the venire and excusing them for various causes, such as illness, other commitments, or lack of qualifications. It is difficult to discern a constitutionally based distinction between that screening process and the screening process that occurs in court during voir dire.

right may not be waived or forfeited. As this Court stated in *CFTC* v. *Schor*, 478 U.S. 833, 848-849 (1986), "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried."

Permitting a district court to assign jury selection to a magistrate does not entail any of the separation of powers concerns that this Court addressed in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*, and *CFTC* v. *Schor*, 478 U.S. 833 (1986). A magistrate is an Article III officer who is subject to appointment, removal, and supervision by Article III judges. 28 U.S.C. 631. Moreover, the courts have never been required to assign tasks such as jury selection to magistrates; instead, the courts have been afforded the choice whether to make such assignments. This is therefore not a case of a "congressional attempt[] 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *CFTC* v. *Schor*, 478 U.S. at 850 (citation omitted). For that reason, the assignment of jury selection to a magistrate does not amount to a "structural" constitutional violation that transcends the rights of the individual litigant and is not subject to the normal rules governing the forfeiture of constitutional rights.

3. Respondent is clearly wrong in contending (Br. 36-39) that permitting a magistrate to conduct jury selection is a plain error under Rule 52(b). Rule 52(b) applies only to "particularly egregious errors" and excuses a procedural default "solely in those circumstances in which a miscarriage of justice would otherwise result." *Young*, 470 U.S. at 15 (quoting *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982)). The error here does not meet that exacting standard.[11]

[11] In our opening brief, we noted that several courts had held that permitting a magistrate to conduct jury selection does not constitute plain error. Since that time, the Sixth Circuit has joined those courts, holding that *Gomez* does not apply when the defendant fails to object. *United States* v. *Sawyers*, 902 F.2d 1217, 1220 (1990). The First Circuit has held to the contrary, ruling that magistrate-conducted voir dire constitutes plain error that can be raised on appeal even if not objected to below. *United States* v. *Martinez-Torres*, No. 87-2006 (Aug. 20, 1990) (en banc).

Respondent argues that having a magistrate preside at voir dire "may well have devalued if not demeaned the process of jury selection in the jury's eyes" and could have induced members of the venire not to take "seriously their responsibility to answer voir dire questions candidly and fully," because "an Article III judge helps impress on the jurors the gravity of their mission in ways that a magistrate cannot." Br. 36, 39. Respondent does not cite any evidence to support her claim that jurors approach jury selection less seriously when a magistrate conducts voir dire, and that proposition is certainly not intuitively obvious.

It is doubtless true that a judicial officer brings to the voir dire a sense of solemnity that would be absent if it were conducted by the lawyers alone, or perhaps even if the clerk of the court presided. But it is hard to credit the claim that a magistrate will have a materially different effect on the members of the venire than a district judge. Both are judicial officers, and both are likely to perform the task of conducting voir dire with equal seriousness. In the absence of any evidence that a magistrate-conducted voir dire has had an adverse effect on jurors, in this case or in general, it would be wholly unjustified to presume that the use of magistrates to select the jury invariably results in a miscarriage of justice.[12]

[12] Respondent can find only one feature of the magistrate's voir dire to complain about: the magistrate's refusal to ask a question about the jurors' attitudes toward Vietnam veterans. J.A. 48-49; see Resp. Br. 5. Respondent asserts that "an Article III Judge would surely have posed" that question, Resp. Br. 39, but she pro-

Nor is there any reason to suppose that the use of a magistrate is likely to affect the verdict by unfairly skewing the composition of the jury. Even if it is assumed that a magistrate will be less careful or less skilled at jury selection, it is far from clear which side that disability favors; in a particular case, a defendant might well conclude that he is better off with a less experienced, skilled, or careful officer presiding over jury selection, since errors in the process do not necessarily favor the government. For that reason, the defendant should not be permitted to accept jury selection by a magistrate and then later claim that the use of a magistrate for that purpose was an egregious error that led to a gross miscarriage of justice.

4. Respondent's final argument (Br. 39-46) is that it is reversible error for a magistrate to conduct voir dire unless the defendant personally consents to that procedure, which respondent did not do in this case.

Even if respondent were correct that Article III requires that a party must consent in order for a magistrate to conduct a criminal trial, that proposition would not help respondent, since the magistrate did not conduct the trial in this case. The magistrate simply assisted the court by conducting a preliminary proceeding that was subject to a de novo review by the court at her request. This Court's decision in *Raddatz* shows that if de novo review of a magistrate's actions by the district court satisfies Article III, placing on the defendant the burden of requesting such review also does not violate Article III.[13]

---

vides no basis for that assertion. Moreover, at the conclusion of jury selection, respondent's counsel expressly declined an invitation to object to the way and jury was selected, J.A. 54, and she did not raise that point before the district court.

[13] Each of the cases cited by respondent holding that consent is necessary involved the magistrate's presiding over the trial or entering a final judgment in the case.

Respondent also characterizes the right to have a district court conduct voir dire as a "personal" and "fundamental constitutional right," Br. 44, 45, that only a defendant herself can waive, but that characterization does not help her case. The right at issue here is not the right to have a trial at all, nor is it the right to have a jury decide the defendant's factual guilt or innocence before an Article III judge; respondent received both. At issue is only a defendant's right to have an Article III judge preside over the selection of the jury. Since the actual decisions that a court makes regarding which members of the venire should serve on the jury can be subject to a procedural forfeiture rule, *Wainwright* v. *Witt*, 469 U.S. 412 (1985) (defendant can forfeit an objection to the exclusion of members of the venire due to their attitudes toward capital punishment), there is no reason to treat this issue in a different manner. See *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988) ("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function if every tactical decision required client approval.") (footnote omitted); *Estelle* v. *Williams*, 425 U.S. at 512 ("Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney.").

For the foregoing reasons and those given in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

AUGUST 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20084

FOR ARGUMENT

Supreme Court, U.S.
FILED
SEP 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1363 (8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES,

Petitioner,

v.

DARLINA K. FRANCE,

Respondent.

REPRINTED COPY

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

MICHAEL R. LEVINE
(Appointed by this Court)
Federal Public Defender
District of Hawaii
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
(808) 541-2521
Counsel for Respondent

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. Magistrate Voir Dire Violates Article III And Also Constitutes Plain Error 1

B. Respondent's Failure To Object To Magistrate-Conducted Voir Dire In The Instant Case Did Not Constitute A Knowing Consent To The Procedure 4

C. Objection Was Futile And/Or Excusable 5

TABLE OF AUTHORITIES

CASES	Page(s)
Crowell v. *Benson*, 285 U.S. 22 (1932)	3
Northern Pipeline Construction Co. v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982)	3
United States v. *Aikins*, Slip op. No. 88-1369 (9th Cir., Aug. 15, 1990), 1990 Westlaw 116872	4
United States v. *Gomez*, 109 S.Ct. 2237 (1989)	*passim*
United States v. *Lake*, Slip op. No. 89-2852 (7th Cir., Aug. 10, 1990), (1990 Westlaw 113862)	4
United States v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989) (withdrawn)	1
United States v. *Martinez-Torres*, Slip. op. No. 87-2006 (Aug. 20, 1990) (en banc), (1990 Westlaw 120629)	1, 4, 5, 6, 7
United States v. *Raddatz*, 447 U.S. 667 (1980)	2, 3
United States v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983)	5, 6, 7
United States v. *Teague*, 908 F.2d 752 (11th Cir. 1990)	5

STATUTES & CONSTITUTIONAL PROVISIONS	
U.S. Const. Art. II § 2	2
U.S. Const. Art. III	1, 2, 4
U.S. Const. Art. III § 1	1
U.S. Const. Art. III § 2 Cl.3	2
18 U.S.C.A. § 3231	2
Fed. R. Crim. P. 52(b)	1

A. Magistrate Voir Dire Violates Article III And Also Constitutes Plain Error.

The recent First Circuit case of *United States* v. *Martinez-Torres*, Slip op. No. 87-2006 (1st Cir. Aug. 20, 1990) (en banc) (1990 WL 120629), which reversed the earlier panel decision in *United States* v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989) (withdrawn),[1] supports the conclusion that magistrate voir dire, even if consented to, violates the structural requirements of Article III. In addition, the case confirms that magistrate voir dire constitutes, in the words of Fed. R. Crim. P. 52(b), a "defect[] affecting [a] substantial right[]."

In *Martinez-Torres*, the First Circuit held that the defendants' convictions must be reversed, notwithstanding a failure to object, because the error in having the magistrate select the jury was "plain." In reaching this conclusion, the court reasoned from *Gomez* that "[i]f empaneling the jury is a 'critical stage of a criminal trial' [as *Gomez* held] and there is no one with 'jurisdiction to preside,' surely this 'affects the fairness, integrity and public reputation' of the proceedings." Slip op. at 9. To hold otherwise, suggested the court, would permit a judge "to absent[] himself from the trial some morning to attend to other business and appoint [] an able clerk to preside, provided that the clerk's evidentiary rulings were within discretionary limits." *Id.* If, as *Martinez-Torres* concludes, a magistrate who is without jurisdiction to preside at jury selection is the same as "a man or woman taken off the street, *id.*," or, in the words of the government, is the same as "a panel of citizens," it is difficult to understand how the structural safeguards of Article III have been met. After all, Section 1 of that

---

[1] The government had relied on *Lopez-Pena* in its opening brief (Br. 6, 14, 15, 26).

Article demands that "the judicial power of the United States *shall* be vested" (emphasis added) in courts whose judges shall have life tenure and whose salaries shall not be diminished.[2] A man or woman from the street, a Harvard law professor, or a panel of citizens, however learned, would not satisfy these requirements.

Having been charged with a federal crime in federal district court, and having elected a jury trial, respondent, *as well as the public*, was entitled to the nonwaivable structural safeguards of Article III.[3] Moreover, contrary to the government's assertion (Reply Br. 12), Article III *does* create a different rule for criminal and civil trials. Indeed, Article III, § 2, Cl. 3 expressly guarantees the right to a jury trial *only* in a criminal case, not a civil case. Consequently, unlike in a civil trial, respondent may not waive the structural requirement of an Article III Judge at a critical stage of her criminal trial.

The government argues that jury selection by a magistrate does not violate Article III because, as in the case of the pre-trial suppression hearing in *United States* v. *Raddatz*, 447 U.S. 667 (1980), "the Article III judge was available to review the magistrate's conduct of the voir dire and make the ultimate decision whether an impartial jury had been selected." Reply Br. 13. The government's argument is not sound because it overlooks this Court's unanimous observation in *Gomez* that, unlike in the case of a pre-trial suppression hearing, the Court "harbor[s] serious doubts that a district judge [can] review [jury selection by a magistrate]." *Gomez*, 109 S. Ct. at 2247. Therefore, even if the Article III Judge is, in Justice

[2] Moreover, pursuant to Article II, § 2, such officers must also be nominated by the President and approved by the Senate.

[3] Federal courts have exclusive jurisdiction over crimes against the United States. 18 U.S.C.A. § 3231.

Blackmun's words, "waiting in the wings," he is *not* "fully able to correct the errors." *Raddatz*, 447 U.S. at 686 (Blackmun, J., concurring).[4]

Moreover, meaningful review of the many complex and subtle decisions involved in selecting an impartial jury, some of which were outlined by this Court in *Gomez*, 109 S. Ct. at 2247, is highly doubtful. Hence, since correction of errors is not realistic, an Article III judge, practically speaking, does not make the "ultimate decision" respecting selection of the jury. Under the reasoning of *Raddatz*, however, such "ultimate decision" making is a prerequisite to the constitutionality of any delegation of authority to a magistrate. *Raddatz*, 447 U.S. 667, 638. By delegating to the magistrate, a person without jurisdiction, the critical and virtually unreviewable function of jury selection in a felony case, the Article III judge stripped himself of an "essential attribute[]" of judicial power. *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 59, 81 (1982) (plurality opinion) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932)). Therefore, the delegation in the instant case violated Article III.[5]

[4] *See Northern Pipeline* 458 U.S. at 91 (Rehnquist, J., concurring) (because bankruptcy court resolves matters "in the first instance" and because there is only "traditional appellate review," such courts are not adjunct courts and therefore court's adjudication of this lawsuit is violative of Art. III).

[5] For similar reasons the delegation also violates due process of law. In *Raddatz*, this Court reasoned that having a magistrate conduct the suppression hearing does not violate due process because at such a pre-trial hearing the due process interests are of "lesser magnitude" than those at "the criminal trial itself" and because district judges have the responsibility to make an "informed" review of the magistrate's decisions. *Raddatz*, 447 U.S. at 679-82. The case at bar, by

B. Respondent's Failure To Object To Magistrate-Conducted Voir Dire In The Instant Case Did Not Constitute A Knowing Consent To The Procedure.

Martinez-Torres also held that a defendant's mere failure to object to magistrate-conducted voir dire did not constitute his knowing consent to the procedure. *Martinez-Torres*, Slip op. at 8. In reaching its conclusion, the First Circuit relied on this Court's unanimous opinion in *United States* v. *Gomez*, 109 S. Ct. 2237 (1989) and on Congress' insistence upon a defendant's written consent to have a magistrate preside at a misdemeanor trial. It rejected as a "radical jump" the bald conclusion of some courts that the absence of an objection itself constituted the necessary consent. Slip op. 10. The court reasoned, much as respondent did (Br. 39-46), that "the statutory concept of requiring defendant's written consent, even for a misdemeanor trial, necessarily negated waiver, even oral consent, by counsel for an *uninformed* defendant in a felony case." Slip op. 10 (emphasis added).

The Ninth Circuit had reached a similar conclusion a few days earlier in an opinion written by Judge Noonan, and held that any waiver of the right to have an Article III judge select a jury in a felony case had to be evidenced by the defendant's "specific written consent." *United States* v. *Aikins*, Slip op. No. 88-1369 (9th Cir., Aug. 15, 1990) (1990 WL 116872); *see also United States* v. *Lake*, Slip op. No. 89-2852 (7th Cir., Aug. 10, 1990) (1990 WL 113862)

---

contrast, concerns a "critical" stage of the trial itself. *Gomez*, 109 S. Ct. at 2248. Moreover, the decisions made at this critical stage are not susceptible of meaningful review. *Id.* Respondent does concede, however, that the due process violation, unlike the Article III violation, can be waived. As argued in the opening brief (Br. 39-46), however, any such waiver must be express, knowing and intelligent as it was in *Lake*, *infra*. No such waiver occurred in the instant case.

(consent valid where magistrate "carefully explained" to the defendant the consequences of the defendant's personal choice to have a magistrate select the jury); *cf. United States* v. *Teague*, 908 F.2d 752 (11th Cir. 1990) (defendant's right to testify must be waived personally by defendant, not by counsel).

In the instant case there was no explanation on the record of any kind given to respondent of her right to have an Article III Judge conduct jury selection. Nor did she give any oral, much less written, consent to have the magistrate select the jury. Thus the judgment below may be affirmed on this ground,[6] and the Court need not reach any of the other more complex issues raised by respondent.

C. Objection Was Futile And/Or Excusable.

In *Martinez-Torres* the First Circuit, reasoning along the lines of the Ninth Circuit's opinion in *France* below, held that in light of the prevailing law within the First Circuit, as well as nationwide, failure of the defense to object to magistrate voir dire was "entirely excusable." Slip op. 7. In reaching this conclusion, the court analyzed its prior decision in *United States* v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983), and the prevailing law in other circuits

---

[6] In its reply brief the government argued that respondent's personal consent to magistrate conducted voir dire was unnecessary because the jury selection was merely "a preliminary proceeding that was subject to de novo review by the court at her request." Reply Br. 16. However, both premises of this argument were unanimously rejected by this Court in *Gomez*. First, jury selection is not a mere preliminary procedure, but rather a "critical" stage of the trial. *Gomez*, 109 S. Ct. at 2248. Second, "meaningful" de novo review of the many subtle and complex decisions that must be made at jury selection is simply not possible. *See Gomez*, 109 S. Ct. at 2247.

at the time the jury was selected in *Martinez-Torres*. The court found, just as respondent has argued (Br. 16, n.8), that *Rivera-Sola* had voiced "unreserved approval" of magistrate-conducted voir dire, Slip op. 6, and that *Rivera-Sola* represented a "clear endorsement" of the practice. *Id.* The Court reasoned that *Rivera-Sola* did not provide the defense attorneys in *Martinez-Torres* "with reasonable hope that they might persuade the Puerto Rico [federal district] court to jettison its time-saving rule." *Id.*

Indeed, according to the court, to require objection under such circumstance would only encourage "obnoxiously belligerent counsel, who, in spite of history, or ignorant thereof, object to everything as a matter of principle. . . ." Slip op. 7. This is much the same view taken by the Ninth Circuit, Pet. App. 10a, and by respondent. *See* Br. 22-24 (to force counsel to make futile objections in the hope, however remote, that the prevailing law might be overturned would "open the floodgates both at trial and on appeal to meritless claims" and overwhelm an already overburdened judiciary).[7]

Finally, in its reply brief the government concedes that "[i]n the case of a contention that counsel knows neither the court of appeals nor this Court is likely to accept, it is entirely reasonable for counsel to forgo raising it. . . ." [Reply Br. 6] This describes much the same situation that faced respondent's counsel at the time of jury selection in the instant case. Accordingly, the government's concession disposes of the issue.

---

[7] The court also noted, as respondent argued (Br. 18), that the defendants' failure to raise the issue on appeal until after *Gomez* was decided was "a full answer to the government's sometime suggestion that defendants [were sandbagging]." Slip op. 3.

In any event, the case for excusing respondent's failure to object in the case at bar is much stronger than in *Martinez-Torres* for two reasons. First, in the latter case the dissent quarrelled with the majority's conclusion that *Rivera-Sola* had rendered future defense objection futile. The dissent argued that the Circuit's approval of magistrate-conducted voir dire in *Rivera-Sola* was mere dictum. Slip op. 22 (Selya, J., dissenting). Agreeing with the majority, however, the dissent pointed to the Ninth Circuit as an example of a true "solid wall" of adverse precedent. *See* Slip op. at 22 ("[I]n this circuit, unlike in the Ninth, there was no 'solid wall' [of adverse circuit authority]"). Therefore, *Martinez-Torres* strongly supports affirmance of the judgment of the Ninth Circuit with respect to futility.

Second, based apparently on government representations made for the first time at oral argument, the dissent in *Martinez-Torres* asserted that in the district of Puerto Rico, notwithstanding *Rivera-Sola*, the district judges "frequently selected jurors themselves." Slip op. 28 (Cambell, J., dissenting). In stark contrast, within the District of Hawaii, as shown by respondent and as pointed out by the government, magistrates selected the jury in "virtually all" cases regardless of objection. Pet. Cert. 3, 7; Resp. Br. 23. Indeed, notwithstanding the government's most recent assertion that Hawaii "did not invariably" assign jury selection to magistrates (Reply Br. 5), the government fails to cite a single case in the District of Hawaii, after the Ninth Circuit's "solid wall" was erected, in which a defendant's objection caused a district judge, instead of a magistrate, to select the jury. This failure confirms the Ninth Circuit's assessment in *France* that objection by respondent below would have been futile.

Respectfully submitted,

MICHAEL R. LEVINE
(Appointed by this Court)
Federal Public Defender
District of Hawaii
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
(808) 541-2521
Counsel for Respondent